United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

75-1011 75-1017

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

THOMAS MCNAMARA,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPENDIX for APPELLANT McNAMARA

VOLUME III
(Pages 1155a through 1714a)

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UNITED STATES COURT OF APPEALS
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1 McMullen - direct

DIRECT EXAMINATION

BY MR. LEONE (Cont'd):

Q When were they taken?

A I don't know. Sometime during the summer of 1972. They were taken upstate.

Q In 1972?

A Yes, I believe so.

Q That was a year --

A I'm sorry. They were taken just shortly before Harold Goberman was interviewed -- I believe they were taken the summer of --

THE COURT: Allen Goberman?

THE WITNESS: Harold Goberman was interviewed the day before and I got a hold of Allen the very next day. I think they were taken in July or August of 1973 by another police agency.

Q In July or August?

A Yes, sir, I believe so. They were taken at the Monticello Racetrack.

Q At whose direction were they taken?

A I don't know. I don'tknow those circumstances. If you want to know what was told to me --

Q Yes.

A These photographs were sent down to use by --

whatever police agencies took them at the Monticello Race-track. They said these are Colombo people and they wanted us to identify the people in the photographs.

Q Was that in connection with this case?

A No, sir, it was not at all.

Q Now, when, if ever, did you come into possession of a picture or mugshot or whatever of Alphonse Merolla?

A The next time I had a picture or a mugshot of Alphonse Merolla was when I took the mugshot of Alphonse Merolla the date of his arrest.

Q Again, when you went to see Allen Goberman for the purpose of seeing whether or not he could identify Alphonse -- that was your purpose whether or not he could identify Alphonse Merolla; isn't that correct?

THE COURT: Well, maybe -- it may be at this point Mr. --

Q It was your purpose whether or not Allen Goberman could identify the person that Harold Goberman identified two days earlier; is that correct?

A Yes. That's correct, to find out if Allen Goberman could identify the same individual as Harold Goberman identified previous.

Q Harold Goberman identified Alphonse Merolla who he referred to as Fat Nicky?

3 McMullen - direct

A Correct.

THE COURT: Did you at that time have any idea as to what the man's name was? Do you remember?

THE WITNESS: I believe, your Honor, what is the information from the other police agency.--It may have been the Monticello Police Department--that one of the individuals was Alphone Merolla.

When that information was received by my supervisor in the New York office, he suggested we did not know the identify of all the individuals in this case at that time, that there was an individual in that photograph with the name of Alphonse Merolla, to send them out to me to find out if he was in fact identical to someone in the case.

BY MR. LEONE:

Q As a matter of fact, in your 302 report which is dated August 24, 1973, you refer to the individual picked out by Harold Goberman as Alphonse Merolla; is that right?

A That's right.

Q You knew his name?

A Right, I knew his name. I know there was Alphonse Merolla in the photograph.

Q And you knew his date of birth?

4 McMullen - direct

A From a Department of Moter Vehicle check I made that day.

Q You knew who you were talking about in this picture; right? You knew the person identified to you as Fat Nicky was Alphonse Merolla and you knew his date of birth?

A Yes, sir, that's correct.

Q Did you make any attempt before you went to see Allen Goberman to get a mugshot and to get other pictures of other people who bore some fair resemblance to the person you were asking Allen Goberman to identify?

A I made an attempt to find out if he had a police record and I don't believe we had a positive return from the police department on available mugshots of Alphonse Merolla.

I made no other attempt to obtain any photographs of him or any other individuals for display purposes.

Q Did you make an attempt to locate a photograph of Alphonse Merolla from the FBI --

A From the FBI -- well, there wasn't any available.

Q Did you make any attempts to?

A I certainly did.

Q You did?

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A Yes, sir.

Q Where did this interview with Mr. Allen Goberman take place?

A It took place in his office which is located in the basement of his home at 394 Hoffman Lane in Hauppauge, New York.

Q How long did this interview take place?

A I would say approximately five to ten minutes, that's all.

Q Five to 10 minutes?

A Very brief.

Q Would you tell us as best as you recollect what you said to Allen Goberman and what he said to you?

A Yes. I introduced myself and I said that I have two photographs that I would like him to look at and could he identify anyone in the photographs that was present on June 5th and I gave him the photographs and he looked through them and identified the photographs of Alphonse Merolla.

Q Tell us what he said.

A He said this fellow was there. I asked him if he knew his name. He said no, but he said he was there.

Q Did you then inform Mr. Allen Goberman what

this fellows name was in the course of your conversation?

A I don't recall if I did or not, Mr. Leone.

Q Did you ask Mr. Allen Goberman any other questions concerning this incident?

A No, sir, I did not.

Q None at all?

A No, sir. He was very busy. He was getting a job -- business, and he was extremely busy and I excused myself.

Q You said the conversation took at least five or 10 minutes.

What you described to us, I think you will agree, described 15 seconds.

A Yes, sir. I introduced myself and asked how things were going. He said fine. I said I wanted to show him some photographs and he said fine.

Maybe if I said five to 10 minutes, I may be inaccurate.

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(Continued on next page.)

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DIRECT EXAMINATION

BY MR. LEONE: (Continued)

Q Would you say it took 30 seconds?

A No, we exchanged amenities. I am sure I asked him how he physically was doing and his business and what he was doing at that time and I believe he showed me a structural drawing and explaining to me how he creates a bid for the job and that he was very busy and he was doing this bid and in the process of costing out the business.

Q Did you ask Mr. Goberman on how many occasions he had seen this person that he identified?

A I think from previous interviews he mentioned that he had only seen him one time.

Q One time?

A I believe so.

Q In that office?

A On that date in the office.

Q Did you ask Mr. Goberman, what if anything he had seen this individual who he had just picked out from this photograph, doing, if anything at that time?

A No, I never asked him specifically what this individual had done on a particular occasion, no, sir. He had related to me previously what he says was his best recollection of June 5th and I assumed that what he

told me previously still stood -- you know -- was still correct.

Q What had he told you previously?

A Well, if I could revew my 302 of the first interview --

Q You can't tell us of your own recollection?

A No, sir, I haven't looked at it for awhile.

Q Did you at any time before you showed this man these pictures, get or ask for a description of the people what he saw in that room?

A I believe I did.

Q At that interview?

A This interview?

A Yes.

A No, sir, I did not.

Q At some prior interview?

A Yes, sir.

Q So that it is your testimony that at this interview Mr. Goberman simply identified the person in this photograph as being at the McNamara site on June the 5th?

A That is correct.

Q Correct. That you did not ask him what if anything the man did?

A Not on this occasion, no, sir.

MR. LEONE: May I have just a second, please?

(Pause)

Q Agent McMullen, I refer your attention to a 302, Government's Exhibit -- I am not sure of the exact date --

MR. RITCHIE: 3522.

Q -- 3522, and I ask you whether it refreshes your recollection as to a description given to you by Alan Goberman concerning an individual who he says was on the site on June the 5th.

(Document shown to witness)

THE COURT: Could you give me the date of that?

MR. LEONE: This is dated October 13, 1972.

A Yes, sir.

Q Does it?

A Yes, sir.

Q What description did Mr. Goberman give you of one of the individuals?

A One of the individuals he gave me a description of, short fat, Italian and in his 30's.

THE COURT: What?

A Short, fat and in his 30's -- referring to his age -- and being Italian.

Q Agent McMullen, I show you these two photographs which you have said are pretty much the same.

A Yes, sir.

Q I ask you whether or not you can see more -- the faces of more than two people in that photograph?

A I can only see the faces of two individuals in this photograph?

Q The individual sitting next to Alphonse Merolla, can you describe him for the record, please?

A He is an older man, maybe in his fifties, dark hair, possibly stocky wearing a sweater, what appears to be a sweater and a dark colored shirt and he has his hands together, you know, leaning on his elbows at the table.

Q The second group of two photographs, how many of the faces can be seen of the people in those photographs?

A Three, sir.

Q Would you describe the face of the man sitting next to Alphonse Merolla in those photographs, is it the same man that you have just described to us as being approximately 50 years old?

A Yes, it is.

Q Is there someone else's face?

A Yes, sir.

Q How old or how would you describe that person?

A A fellow with dark hair, on the long side, judging from this photograph, I would say he is heavy-set --

THE COURT: What did you say?

A Heavy-set, heavy, sir. And I would say that he is approximately 30 to 35 years of age.

Q We are talking about the gentleman who in the photograph appears to be opposite the other two people that you have described, is that correct?

A That is correct.

Q Have you been able to identify who these gentlemen are?

A No, sir, I have not.

Q Now, the person that you have depicted as being approximately 35 years old, sitting opposite Alphonse Merolla and the 50 year-old gentleman, looking at the photograph, can you see anything more than a side view of that person's face?

A No, just the profile view. I can't see anymore, except for the shoulders.

Q Yes, shoulders and side of the face and he is facing Alphonse Merolla and the 50 year-old man in the photographs?

A Yes, sir.

MR. LEONE: Just one question and that will

be it, Judge.

(Pause)

Q Agent McMullen, do you have any idea how much that 35 year-old gentleman weighed?

A No, sir, I have no idea?

Q If I told you he weighed approximately 200 pounds, would you quarrel with that?

A Of course a lot depends on his height, doesn't it?

Q Are there any other people in these photographs that appear to be approximately 300 pounds?

A No, sir.

MR. LEONE: No further questions.

(Continued on next page.)

THE COURT: I guess this is strictly Mr. Leone's business from your point of view?

MR. GILLEN: Right.

THE COURT: I guess it is up to you now.

EXAMINATION BY MR. RITCHIE:

Q Would you say the most prominent feature on Mr. Alphonse Merolla is the stomach?

A Yes, sir, I have to make that observation.

Q From anyof these four photographs, in any of these four photographs, is Mr. Merolla's stomach featured?

A Partly in two of the photographs. Those two photographs where there are only three individuals in it, yes.

Q They are partial or full view?

A Partial view.

Q He is sitting down?

A Yes.

Q At the time the initial interview of Allen Goberman, were you aware of the identity of the person he described as a short, fat individual?

A No, I wasn't.

MR. LEONE: Could I have that repeated, please.

(Whereupon, the last question and answer were read by the reporter.)

Q Did you show Mr. Goberman a number of photographs at that time?

A I believe I did.

MR. RITCHIE: Can you mark this? This has been previously marked as Government's Exhibit 25 for Identification in the prior trial.

THE CLERK: Now marked as Government's Exhibit, hearing exhibit 1.

(So marked.)

Q Were these photographs shown to Mr. Allen Goberman?

THE CLERK: That is Government, Government Hearing Exhibit 1.

A I don't recall if they were or not, Mr. Ritchie.

THE COURT: You don't recall?

THE WITNESS: I don't recall if they were shown to Allen Goberman or not.

MR. RITCHIE: I have no further questions. Well --

MR. FISCHETTI: May I see those photographs?

MR. RITCHIE: Yes.

MR. FISCHETTI: Are you finished, Mr. Ritchie?

MR. RITCHIE: I believe I am, yes.

EXAMINATION BY

MR. FISCHETTI:

Q These photographs, Mr. McMillan, just shown to

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you by Mr. Ritchie which have a tag on the envelope listing it as Government's Exhibit 1, directing your attention to those photographs, were those photographs that you showed to Mr. Allen Goberman on or about October 13, 1972?

A I don't recall unless I look at a 302.

Q Please do.

Again showing you your 302, marked 3500-22, an interview reportedly of Mr. Goberman taken 10/13/72, and directing your attention to approximately the middle paragraph.

Doesn't it say there on that day you showed photographs to Mr. Allon Goberman?

A (No response.)

Q Let me ask it this way, doesn't your report indicate there on that occasion Mr. Allen Goberman identified a photograph of Mr. John DeLiso?

A Yes.

Q And this envelope which contains those pictures bears handwriting, does it not?

A Yes.

Q Is that your handwriting?

A Yes.

Q Is there a printed item on that envelope saying, "description"?

A Yes.

Q Would you read what it says under the word "description," in your handwriting.

A Yes, I will. Photographs shown to Garry Traibbi, and Harry Goberman on 9/19/72.

Q Viewing those photographs, would you find the photograph in there, if one exists, of John DeLiso?

A Yes, there is one here.

Q Can you tell me now whether this array of photographs was the same array of photographs shown to Allen Goberman indicated in your report of 10/13/72?

A Yes, I believe it was. I looked at these and the report, I remember the interview and the circumstances under which Allen Goberman identified John DeLiso from the group of these photographs.

MR. FISCHETTI: I have nothing further.

MS. SELTZER: In that same 302, I believe it says that the agents showed photographs and Alphonse M. Merolla was identified.

MR. RITCHIE: Yes.

MS. SELTZER: The same --

MR. RITCHIE: This is the same array.

MS. SELTZER: Your Honor, I was not present at the last trial.

MR. LEONE: May I just say at this time I have

no further questions of the witness.

MS. SELTZER: Was there a hearing held at the last trial?

MR. RITCHIE: There was.

MS. SELTZER: As to the identification?

MR. RITCHIE: There was no question directed towards Mr. Allen Goberman at the last trial. He made an in-court identification of John DeLiso and Alphonse M. Merolla.

Your Honor, I would like to know -- is your Honor prepared for argument yet?

THE COURT: Yes.

MS. SELTZER: I would ask Mr. McMillan if this is the same array shown to Allen Goberman in which he identified Alphone Merolla.

THE WITNESS: I believe so.

MS. SELTZER: Do you know it to be a fact or were there any other pictures shown to him?

THE WITNESS: No, there were no other photographs of Alphonse Merolla available.

MS. SELTZER: I have no further questions.

THE COURT: I take it, gentlemen, that these three photographs were in Government's Exhibit 1 at the time of the first interview with Mr. McMillan, had with

Allen Goberman?

MR. RITCHIE: That was my point.

MR. LEONE: What three?

THE COURT: These three (indicating).

MR. LEONE: 1972, yes, sir.

THE COURT: So that that makes it seem as though on some basis or other pictures of some fat men were included in the array?

THE WITNESS: Yes, sir. But the identification of John DeLiso on this instance was made by Allen Goberman. He made the comment he knew the individual years before and had known him for years.

THE COURT: So that that was not based on any --

THE WITNESS: His sole identification of John DeLiso was not based on the photographs but past association.

THE COURT: I am after anothing thing. I am asking why these three men who bear not the slightest resemblance of John DeLiso was included in the array.

THE WITNESS: Because at the time of the interview of Allen Goberman we did not have the names of all the individuals involved in this case.

THE COURT: Was this -- was this included as responsive to a description as one of the men being

very heavy?

THE WITNESS: Yes. And by virtue of the fact I knew these individuals you see are associated in some degree with Alphone M. Merolla and I knew these are individuals who visited him at his home. They were included to find out if the witness for the Government could also identify any of these individuals as participating with the others in the case.

THE COURT: They are men, what I guess -- they are NYS numbers on the back?

THE WITNESS: Yes.

THE COURT: T270661AX.

THE WITNESS: That means that photograph was filed in the file for this particular case.

THE COURT: I see. I don't know how else to identify the three except by description. These are three men markedly heavy --

THE WITNESS: Yes. I know the names of these individuals if you want it.

THE COURT: One is USM2161, a color Polaroid.

MR. RITCHIE: That is Philip DeGuardia, your Honor.

THE COURT: The other one is FBI, P.T. DeGuardia. The other one is C. Vitali.

THE WITNESS: Caesar Vitali.

THE COURT: Did Mr. Allen Goberman have any hesitation in selecting --pointing out Mr. Alphonse Merolla in the group of photographs?

THE WITNESS: No, sir. No hesitation at all. None at all. Neither that nor did he have any hesitation of John DeLiso, which is an old photo. He commented: "This is an old photograph and is not a close likeness of how he dresses now and his hair style or how heavy he is."

There was no hesitation about that one, either.

THE COURT: Well, do you want to say something, Mr. Leone?

MR. LEONE: I have no further questions other than what I asked.

THE COURT: Do you press your motion to suppress?

MR. LEONE: I certainly do.

THE COURT: There was an immediate suggestion --

MR. LEONE: Yes, sir. I don't think it's at all a fair array of photographs to present to a witness who on one occasion --

THE COURT: I don't think Mr. McMullen has tried to present it in that light.

MR. LEONE: I don't accuse him of doing this

intentionally, your Honor, but your Honor knows the argument, it impresses in the witness' mind unfairly the likeness of this defendant.

THE COURT: Yes.

What do you say, Mr. Ritchie?

MR. RITCHIE: Your Honor, I believe that we have to look at this display to Mr. Allen Goberman in light of the investigation to that date. To that date Mr. Goberman had been shown other photographs of heavy-set individuals who fit the basic description of fat, short, thirties, and let's say look like Italian, and Mr. Goberman failed to identify those individuals.

In a sense while shown one photograph at a time, he was also in a sense shown a number of Italian individuals of a certain weight and certain height and certain age. And he had previously not identified other individuals of that general physical description.

At the time that Mr. McMullen came into possession of the photographs, the individual Alphone Merolla had not been identified as part of this alleged extortion. I believe that the testimony was one day before Mr. Harold Goberman who identified him -- and then Harold Goberman's identification that there was

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no identification of this short, fat, 30s individual. The only photograph Mr. McMullen had a possible suspect of a photograph that is not of the type that is amenable to multiplication of similar photographs of similar individuals. The FBI and any law enforcement agency maintains basically one type of photograph that is a so-called mugshot. To have include this photograph with mugshots I think would have been totally suggestive right there. A totally suggestive type of photograph and it would have called attention to it right away.

I don't think there was a realistic choice to present a multiplicity of similar type pictures. I think without any hesitation on Mr. Goberman's part, since it was without hesitation it was a good identification. Mr. Goberman previously had identified five individuals as having been present in that room. All of the defendants on trial the last time except for Angelo --

MR. LEONE: Four.

MR. RITCHIE: No, I believe five. Perhaps I am wrong and I won't press that. But I do believe that the Court should in any event see if Mr. Allen Goberman can make an in-court identification. He saw the

photographs once. We can put him on the stand and I believe he can testify he saw a set of photographs only once.

MR. LEONE: When?

MR. RITCHIE: At the time of the 302.

(Continued on next page.)

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McMullen

MR. LEONE: Sir, I don't mean to interrupt, but I would like to speak to one thing. I think this case, the facts being as they are, I think the agent or the FBI or the Government, had an obligation and a duty at that point in the investigation to see to it that some kind of a fair lineup was held.

THE COURT: If there was an arrest --

MR. LEONE: Yes.

Or, if that was not feasible at the time, at least, being they only learned the man's identity a day or two before, tried to get a mug shot of this defendant so that they could include it with other photographs of people of similar build, height, to see whether or not then, Mr. Goberman would have said, I am sure it is the one, rather than show him what really amounts to a single picture, a photograph of Alphonse Merolla.

I think they had a duty and obligation and there has been no reason shown why this could not wait, since it was a matter of such importance, an identification of an individual who the agent informs Mr. Goberman claims, only saw on one occasion. That being June, 1972.

I need not go into the possibility of

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mis-identification under those circumstances. I think it was important enough at that time to try to get a mug shot even if it took another week. They knew the man's name. I think they were duty-bound at that point to have some kind of a fair lineup. If it was a case where he claimed to have known Alphone Merolla on other occasions, it would be a different situation, but this was just to make sure this was the person we are talking about. But this was a classic identification situation, and I think they had a duty here, Judge, to be a little more careful than they were.

I think they must suffer the consequences. There was no reason shown for this. The man was not arrested until months later.

MR. RITCHIE: Your Honor, I believe that -- he had previously been shown photographs. This is the type of photograph not particularly amenable to--

THE COURT: I heard that.

MR. RITCHIE: I believe that Mr. McMullen has stated he attempted to secure further photographs from the FBI and he was not able to do so. There was no mug shot of Alphonse Merolla on trial. It isn't your normal situation.

McMullen

With respect to Alphonse Merolla, there was a mug shot available and a display was shown. In this case, with the candid photograph, it is difficult to produce such a photograph.

THE COURT: I understand.

MR. RITCHIE: It was a year after -- the Government had been seeking to identify for a year, to identify this last individual, and had not been able to do so.

And -- well, I have nothing further.

THE COURT: Well, the facts appear to be that the pictures that were shown to Mr. Allan Goberman-- was that in August?

MR. RITCHIE: August 24th.

THE WITNESS: No, October 13, 1972.

THE COURT: No.

THE WITNESS: I'm sorry.

MR. RITCHIE: August 24, 1973, your Honor.

THE COURT: August 24, 1973, were four photographs taken, one right after the other, apparently while four men were seated at a booth table at Monticello Racetrack.

The Government had nothing to do with the taking of the photographs, they were taken, apparently,

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by the police at the Monticello Racetrack. And were sent down to the FBI in New York for the purpose of obtaining identification of the men shown in the photographs.

Is that as you understood it?

THE WITNESS: Yes.

THE COURT: And there was an identification of the men by name, or at least some of them.

And one of the names identified to FBI New York was Alphonse Merolla, said to be one of the men seated at the table. The New York office sent that to Mr. McMullen's office, recognizing it as the name of a person already a defendant in a pending indictment, in 73-CR-442, which had been filed the previous May.

Is that right?

THE WITNESS: That is correct, your Honor.

THE COURT: Mr. McMullen showed the photograph first to Mr. Harry Goberman, who identified one of the men in the picture as Pat Nicky, and a day or two later, a picture was taken -- all four pictures were taken by Mr. McMullen, and were shown to Mr. Allan Goberman.

Mr. Allan Goberman had been interviewed

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McMullen

generally in the case on September 9 of 1972.

THE WITNESS: Allan Goberman was October 13th.

THE COURT: That is the memorandum or the date --

THE WITNESS: The date of the interview was October 13, your Honor.

THE COURT: On October 13, 1972.

And at that time had described one of the men as short, fat, in his 30's, and of Italian origin . That is included in the October 13th, 19 -- in the 302 report on October 13, 1972 interview, exhibit 3500-22.

Mr. Allan Goberman, at that time, had been shown an array of photographs which included a picture of John DeLiso and certain other men, and three men who were quite heavy, dark, Italian, and young.

I am a very bad judge of age, they just look young to me. I think they are contended to be men in their late 20's or early 30's or somewhere in there.

These men do not look like Mr. Alphonse Merolla and were not selected as being Alphonse

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Merolla or Fat Nicky, which was all the name that the FBI then had for the heavy man.

That name, by the way, may not ever have been used in real life as far as the defendant involved is concernad. And it is his intention that is entirely a figment of Mr. Allan Goberman's imagination. But that is neither here nor there, his name was not known.

Mr. McMullen's visit to Mr. Allan Goberman was short. Mr. Goberman is a very busy man on other matters, and he had already been interviewed about the merits of the transactions, events of transactions, and indictment being handed down, so that this was an interview directly entirely to determine whether or not Mr. Allan Goberman too, would select the same man that his brother had selected as being the Fat Nicky testified to by Harold Goberman.

Mr. McMullen says he did so without hesitation. It is not contended by the Government that such an array as is presented, was within the four corners of the -- the four prints, four photographs, is the kind of array that would have been arranged if the purpose was to test the capacity of the witness to select from simply look alikes, of a particular

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defendant.

If it is the best the Government had, and apparently a rapid check of police and FBI sources had not turned up any other shots of the defendant Alphonse Merolla, which might have been used in an array, and the Government is quite correct in saying that the use of this photograph with an array would have effectively fingered Mr. Alphonse Merolla anyway -- and the other men at the table with Mr. Merolla, if I may see the pictures again?

(continued next page.)

MR. LEONE: They are here (indicating).

THE COURT: Are they here?

MR. LEONE: Yes.

THE COURT: Now it can be seen more or less in three of the pictures that all dark men, heavy featured and well built, but not of Mr. Alphonse Merolla's proportions.

Now the impression should not be gained that Mr. Alphonse Merolla, the defendant Alphonse Merolla's weight is his only identifying feature, it certainly is not, he is a striking looking mand and unlike the other defendants Merolla is quite different, he is a different, a thoroughly different man and his weight does give him not an appearances of grossness but of command.

He is not an unstriking figure, he is not just a fat man.

The other pictures that were included in the collection shown on the earlier occasion in 1972 are of people, whom, except for one, the colored picture, you would not look at twice except for their weight; they are thus more people like the rest of us.

Now the real question here in all of these cases is whether or not the identification is the witness' or the police department's.

Correct?

MR. LEONE: That is correct.

THE COURT: Here I think it is difficult to reach a conclusion that this was Mr. McMullen's identification and not Mr. Alan Goberman's, and we haven't heard Mr. Alan Goberman's testimony in this case and on this point.

It was simply peripheral last time and I don't think there is any occasion for him to identify Mr. Alphonse Merolla.

MR. LEONE: In fact he did not mention anyone.

THE COURT: What is that?

MR. LEONE: In fact on the last occasion when asked who was in the room he made no reference in anyway either my description or name or in any manner to indicate that Alphonse Merolla, my client, was present.

MR. RITCHIE: Your Honor, that is not quite correct.

MR. LEONE: Let us read it.

It is stated on page 1040.

MR. RITCHIE: He states in his testimony that there were six individuals present in that room. When he was asked to identify any individuals he saw who was in that room, he named five of the

individuals who at that time were seated at counsel table, and they were Rocco Merolla, Alphonse M. Merolla, John De Liso, Thomas and John McNamara.

He didn't mention Angelo Merolla, he didn't recall seeing Mr. Angelo Merolla .

MR. LEONE: Well, so much for the powers of his observation. He said that Angelo Merolla was not there.

MR. RITCHIE: Was there any omission?

MR. LEONE: So much for powers of recollection.

THE COURT: And the jury agreed.

MR. RITCHIE: But at any rate he did state thru indirection that another individual, whoever he might be, was there.

THE COURT: Yes, I think it would be quite hard to read his testimony as excluding the presence of Alphonse Merolla.

I think at this point we are trying to determine simply whether he may be permitted to make an identification, and I think we have to wonder here who has the burden of proof on this issue.

MR. LEONE: Mr. Ritchie (indicating).

THE COURT: I think what Mr. Leone has said is true, the Government was deeply committed to the testimony of Harold Goberman in the other indictment

and in bringing the case on for trial, and as to Harold Goberman, as I understand it. he had already identified Alphonse Merolla and there was sufficient grounds to arrest the man and he could have been arrested and if not identified would perhaps have been quite happy to be dismissed before the Magistrate.

At least we can't assume the contrary, although there were alternatives available. Now if Harold Goberman's testimony was taken at full strength, there was no more and no less reason to bring him into the case than to bring in the other Alphonse Merolla or John DeLiso.

To be sure, nobody has said, so far as I know that there was at the earlier trial and perhaps before the Grand Jury when the 302 had said much about it, "Well, he didn't have the gun, he didn't have a gun, he didn't produce a blackjack or anything else," but he was there, and according to the testimony, if it were then the same as it was at the first trial, that he was there at the trailer --

MR. LEONE: I don't believe the trailer, Judge, I don't believe there was testimony about him being at the trailer.

THE COURT: What is that?

MR. LEONE: I don't believe he was placed at

the trailer.

THE COURT: It was John DeLiso and Alphonse --

MR. LEONE: Yes.

THE COURT: Alphonse M. Merolla?

MR. RITCHIE: Yes, your Honor.

MR. LEONE: Right.

THE COURT: So that his first and only appearance was on the 5th?

MR. LEONE: No, no, your Honor, I think you said my client was placed at the trailer.

THE COURT: Yes.

MR. LEONE: No, that is not my recollection of the testimony.

MR. RITCHIE: I don't recall that, either.

MR. LEONE: Allegedly, according to Harold Goberman, he made his first appearance at one of the restaurants.

THE COURT: Yes, the Chuck Steak.

MR. RITCHIE: At the Candle Light.

THE COURT: At the Candle Light Diner and the second and later at the office.

MR. RITCHIE: At the office and on the third occasion on the 28th.

MR. LEONE: Right.

THE COURT: And on the 28th.

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MR. LEONE: According to Harold, he was there both on the 25 and the 28th.

THE COURT: So he was close enough to be brought into the case, if not willing to be a witness!

I would hesitate on this evidence to hold there had been impropriety of suggestion. I think this was an extraordinary bad choice of procedure, but when you are looking for a man for a year I am afraid all you do is rejoice when you find him. You don't think about the fact that the gentleman may be in doubt.

I think I would feel differently about it if Mr. Merolla was not such a striking looking man who was likely to make an indelible impression; he is just not a fat man, that is not the point, he is an impressive man, a striking looking man.

MR. LEONE: You see what bothers me here is simply, and we have gone through it, I know --

THE COURT: Well, If I can put it this way, as we know from experience, recollection readily confuses, and it is understandable to a person like me who is not good at differentiating people.

But I don't think the same thing can be said of your present client, Mr. Alphonse Merolla; I think he would stand out in any company and not simply because of his weight.

MR. LEONE: You see, Judge, we can go on for a while but for example Mr. Taibbi on the last trial during the Wade hearing stated that he identified one Philip DioGuardi.

THE COURT: Yes, he is one of the men who is in that Government Exhibit 1 of the hearing --

MR. LEONE: Mr. DioGuardi?

THE COURT: Isn't he?

MR. RITCHIE: Yes, your Honor, he is one of the individuals.

MR. LEONE: Mr. Taibbi allegedly was to identify the defendant Alphonse Merolla --

THE COURT: The people who came to trial.

MR. LEONE: My client was not that striking to Mr. Taibbi, in fact the Government has not elected to put Mr. Taibbi on the stand and try to elicit an identification of this man.

THE COURT: I am not so sure that he ever saw him.

MR. RITCHIE: Your Honor, I believe from my conversations with him he is describing an individual who most likely, to my way of thinking, would be Alphonse Merolla; he has described a fat individual as another of the individuals who was present at the job site on I believe June 2nd, the date on which Alphonse M.

2 Merolla allegedly said to Mr. Taibbi that he was not supposed to give, "the old man," he was referring to Thomas McNamara, "any more lip," or they would come after him.

MR. LEONE: My point simply is that what you're saying is that if you see this man, the chances are he is going to be impressed on your mind and you are not going to be influenced by seeing a photograph of him later, but I say to the Court that Mr. Taibbi, who allegedly, it was my understanding as of this morning, was going to identify Alphone Merolla as being on that job site, that he was unable to do so, so why should we assume any special powers to this present new witness.

That is what is bothering me more.

MR. RITCHIE: The last time out your Honor had suppressed his identification through John DeLiso and Alphonse Merolla after an initial mis-identification.

Your Honor, Mr. Taibbi did not identify Alphonse Merolla, Fat Nicky, positively in his 302. As Mr. Leone I think has pointed out, he stated that he resembled.

I would also like to note that I had told Mr. Leone originally that I was going to have Mr. Taibbi make an in-court identification. However, on Friday

3 when I was not able to come up with the photograph upon request I informed the Court that I would not have him identify Fat Nicky -- I'm sorry, Mr. Alphonse Merolla.

MR. LEONE: You informed me that?

MR. RITCHIE: I believe I informed the Court on the record and --

MR. LEONE: You informed the Court?

THE COURT: No, we had it in open court today.

MR. LEONE: I thought it was today, not Friday.

THE COURT: That is right.

He formed a resolution Friday.

MR. RITCHIE: I thought I had informed the Court that I would delete any cross-examination --

THE COURT: You may not, you see, we weren't quite finished with Taibbi's testimony on Friday, and you may have put it over.

MR. RITCHIE: One of the reasons I had these prepared was precisely for this question of Allen Goberman. As to Mr. Taibbi, because of the prior problems with identification, I thought we would forego it.

MR. LEONE: Your Honor, not to reiterate but I think here there were no exigent circumstances shown, there was no reason for it.

4 THE COURT: I think the question is whether the recollection to which the witness testified is a real one or induced.

MR. LEONE: Induced by the photographs and under these circumstances where he is only seen once and under the circumstances of the excitement of the moment, I don't see how we can say that, no, the photograph did not influence him. I don't see that, Judge.

THE COURT: Well, may I take it we would all agree that Mr. McMullen has not testified that he pointed the man out, what we are talking about is whether having rejected the other pictures the preceding year this was unfair, the showing to him of the defendants in hearing exhibit A, that it was unfair, and that the other two men were not within what Mr. McMullen would say was his description of the man.

MR. LEONE: Right.

THE COURT: Well, I don't see it myself.

I think if the rule is that Mr. Ritchie has to show beyond a reasonable doubt there was no suggestion at all, then you couldn't say that that burden of proof had been sustained. But if on the other hand it is the responsibility of the defendant to show that there has been an induced recollection, then I don't think that we could say that here. Now, much would depend on

what Mr. Goberman says, and he has not testified on this issue at all.

MR. LEONE: That is right.

MR.RITCHIE: Does your Honor wish any testimony from Mr. Goberman?

THE COURT: Well, it is not my case, I am just a judge.

MR. RITCHIE: May the Government re-open this hearing and put on further testimony?

THE COURT: What?

MR. RITCHIE: I say may the Government move to reopen this hearing and put on further testimony.

THE COURT: I think we had better hear him, it seems to me.

I think Mr. Meiselman has stepped out.

MR. GILLEN: That is all right, your Honor.

THE COURT: We will have a short recess because I want to get ahold of Simmons, any.

(A recess was then takes.)

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MR. RITCHIE: The Government would call as its next witness, Mr. Allan Goberman.

A L L A N G O B E R M A N , having been first duly sworn by the Clerk of the Court, testified as follows:

THE CLERK: State your full name, please.

THE WITNESS: Allan Goberman, G-o-b-e-r-m-a-n.

DIRECT EXAMINATION

BY MR. RITCHIE:

Q Mr. Goberman, you testified previously concerning a meeting on June 5th, 1972, have you not?

A Yes, I did.

Q Now, do you see anybody in this courtroom who was at that meeting on June 5th, 1972?

A Yes.

Q Would you indicate the individuals that you saw at that meeting?

THE COURT: Would it help you any if you got down from the witness stand and walked around the tables and the courtroom and back and pointed out the people?

(Witness leaves witness stand.)

THE WITNESS: I will point them out, because I do not want to get confused, left to right.

Goberman (wade)-Ritchie

The fellow with the blue jacket, John McNamarra, Sr., the fellow behind here who just waved, and the fellow in front of him with the brown suit. (indicating.)

THE COURT: With the what?

THE WITNESS: The fellow in the brown suit, the last gentleman.

(Witness returns to witness stand.)

Q Were you ever shown any photographs by any agent of the Government?

A It just dawned on me.

There is another gentleman in the room that was there on the 5th.

He is sitting in the audience.

Q Can you identify him, please?

A First row, first seat with the light jacket.

Q That is on your right or left?

MR.LEONE: Are you talking about the gentleman sitting in the courtroom?

THE WITNESS: Yes.

MR. LEONE: Would the record indicate the name of that individual, please?

MR. RITCHIE: I think we can stipulate that is Angelo Merolla.

Goberman (Wade) - Ritchie

MR. LEONE: Yes.

THE COURT: How about the man that just came in the courtroom and sat down beyond the gentleman with the red tie?

THE WITNESS: That's one of their attorneys or an investigator for the McNamarras.

Q Do you see anybody else in this courtroom?

A Well, not that was present at that meeting.

Q There are other individuals that you recognize from other associations?

A From other associations.

Q Now, during the course -- since that time you have been shown photographs, have you not, of individuals?

A Yes.

Q Do you remember on how many occasions you were shown photographs?

A I don't believe it was more than twice.

Q Do you recall which -- how many photographs you were shown the first time and how many photographs you were shown on the second time?

A I can't be sure if it was 2 or 3 the first time, maybe 2 or 3 the second time.

Q Do you recall which individuals were portrayed -- which individuals that you recognized, if any, that were

Goberman-(Wade)-Ritchie

portrayed at either of those two displays?

A More or less.

Q Who were the individuals portrayed?

A I can't be sure if it was one or the other of the Merollas -- one of the Merollas and the other were the one with the brown suit.

Q Was that the first or second?

A I believe that was the first.

Q The one with the brown suit was the first or second?

A I think one of the Merollas was the first time and the one with the brown suit was the second time.

That's two years ago, so that's what I feel now.

MR. RITCHIE: I have no further questions.

EXAMINATION BY

MR. LEONE:

Q Mr. Goberman, prior to your testifying here today, have you had any conversation with Agent McMullan?

A Yes.

Q Today?

A Not today -- just a hello at lunchtime, after lunch.

Q Did you discuss any of your testimony today withhim?

Goberman-(Wade)-Leone

A No.

Q Were you shown any photographs today?

A No.

Q Now, you say that you have a recollection of being shown certain photographs on two occasions?

A Yes.

Q Could you tell us for certain, at this time, as you sit here now?

A I can't tell you dates.

I could tell you around the kitchen table --

Q I am not going to ask you dates.

A All right.

Q Can you tell us for certain, as you sit here now, whose photographs -- if anyone's -- you picked out on the first occasion?

A No, can't tell for certain no more.

Q Can you tell us for certain whose photographs, if anyone's, you picked out on the second occasion you were shown photographs by agent McMullen?

A I can't be positive whether it was the first or second occasion who was identified.

Q But you know you made an identification ?

A Yes, I did.

Q Of that you are certain?

Goberman-(Wade)-Leone

A Of that I am certain.

Q On the first occasion, you know where the interview took place?

A Yes.

Q And can you tell us if you know -- if you know for sure -- how many photographs you were shown on that first occasion?

A I can't be positive, but it was three or four.

Q Three or four?

A Maybe three.

Q And on the second occasion?

A Same thing, 3 or 4.

Q 3 or 4?

A Right -- probably 3.

Q Probably 3 on the second occasion.

Could you tell us what kind of photographs you identified on the first occasion?

A Photographs of about 2 by 2.

Q Did they have a person depicted on those photographs?

A They looked like photographs, you know, photographs --

Q Do you know what a mug shot is?

A That is what they were, mug shots.

THE COURT: Police pictures?

THE WITNESS: Not all of them were, some of them were.

Q On the first occasion --

A I can't be sure.

Q How about the second occasion?

A Can't be sure of that. I recall -- whether it was the first or second, you know, some of them were mug shots.

Q And some were not?

A That's right.

Q Do you recall what kind of photographs you saw on the second occasion?

A Black and white, 2 by 3.

Q Did they have one individual -- were they mug shots?

A I believe one -- no, one of them with two -- two fellows sitting at a table.

Q Did you make an identification?

A Yes.

Q Do you know who you identified at that time?

A I couldn't be sure. I think it was the fellow in the brown suit --

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Goberman-(Wade)-Leone

Q The fellow in the brown suit?

A Right.

Q On that second occasion, did you know how long the interview took place between you and Agent McMullen?

A I would assume probably around half an hour.

Q Half an hour.

Do you recall what discussions, if any, you had with Agent McMullen concerning this matter?

A No, he just came and asked if he could show me some pictures or he called previous to that, and I believe it was at my house, he came over.

I assume it was about half an hour, you say hello, you look at them, and you talk a little, you know.

Q During this approximately half an hour, did he immediately show you the photographs, or were you shown the photographs towards the end?

A I believe I was called up and asked if I would look over some photographs that he was coming over with.

Q I assume there came a time when he came over with the photographs?

A That's right.

Q Do you have a present recollection of what exactly transpired when you spoke to him after you exchanged hellos?

Goberman-(Wade)-Leone

A No, it must have been not -- when you meet someone in a diner, and someone says hello --

Q Do you have any recollection of how the photographs were shown to you or what was said?

A No, -- look at this one, look at this one, do you recognize any of them?

Q Is that what you are saying, or is that what you recall?

A That's what I recall, not to the words, but general.

Q Did Mr. McMullen, at any time, indicate who the people were in the photographs?

A No.

Q Were any names used to your recollection?

A Well, I tell you names might have been used, but I haven't been paying attention to those names from the start -- I didn't know names and I didn't want to start learning names. Nothing sunk in. I still don't know what name belongs to who, except the senior McNamarra.

Q When is it that you say you saw the gentleman you identified in the brown suit?

A Ibelieve he was sitting at a kitchen table or a table with another gentleman, --

Q Where?

Goberman-(Wade)-Leone

A In this kitchen.

Q No, no, in real life, where was it that you say you saw him?

A That afternoon of June 5th, at the McNamarra office.

Q Is there any doubt in your mind about that?

A No.

Q Did you speak to this man?

A Not really -- no, no conversation.

Q How long did you have him under observation?

A Then?

Q Yes.

A On and off for approximately half an hour.

Q Did you see him do anything at that time?

A No, just standing around.

Q Were there other people standing around in that office?

A Yes.

Q Approximately how many would you say?

A 8.

Q Approximately 8 people.

Were there other people going in and out of that room?

A Two people were in there before we came up

Goberman-(Wade)-Leone

there.

Q Before you came up there two people were there?

A Right, they had left the room when we walked in.

Q And then isn't it a fact that you left the room?

A That's right, I left the room after.

Q How long were you in that room?

A 10 minutes, give or take.

Q Then when is it you say you saw the gentleman in the brown suit -- was it during that 10 minutes?

A That was on one of the occasions, yes, during that 10 minutes.

Q When was the other occasion?

A At the end of the conversation or at the end of this meeting when I went back into the room again.

Q How long did you see him then?

A 10 -minutes.

Q During this 10 minute period, is it fair to say that you did not have your eyes riveted on this man?

A Correct.

Q There were other things happening in that room; is that correct?

A Yes.

Q Is it fair to say what you are saying is that you noticed his presence at that time?

A Correct.

Q He did not speak to you as far as you recall?

A No.

Q And you said nothing to him?

A Correct.

Q Where was he standing in this room, to the best of your recollection?

A He was standing in the southwest corner.

Q The southwest corner?

A Right, of the room.

Q Approximately how far away fromyou?

A 5 feet.

Q He was, as I understand your testimony, standing there?

A That's right, as I recall.

Q As you recall?

A Right.

Q You didn't see him doing anything?

A No.

Q Now, when you got into the office, was he already there -- when you first arrived there?

A I think we all walked upstairs together.

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Goberman-(Wade)-Leone

Q You walked up --

A We were downstairs. We came into the showroom downstairs and then walked upstairs.

Q So when you first got into the room --

A Maybe they were upstairs.

Q Maybe they were upstairs.

When you walked upstairs, you say you saw this man for the first time in that room?

A That's right.

Q Right?

A That's right.

Q Now, when you looked at the photograph on the second occasion, is that when you say or you are not sure--

A Either the first or second.

Q When you looked at the photograph, what did you tell Agent McMullen -- what was your first statement?

A Well, I can't say word for word, but I said "This fellow is one of them that was present in the room, you know, at the time," or words to that effect.

(continued next page.)

1 Q How long did you look at the photographs before you made the statement?

A Ten seconds, five seconds.

Q And at that time from looking at the photograph, was there any doubt in your mind --

A No.

Q -- that that depicted the person?

A No.

Q After June 5th, did you ever see this gentleman?

A No.

Q That's the first time you saw him was in that room?

A First and last time, except for in court last year.

Q Last year you saw him in court?

A Right.

Q While you were testifying in this case?

A Right.

Q Where was he sitting?

A Well, just about where they are now, except the table was running the long ways.

Q No doubt in your mind about that?

A No.

Q Positive about that?

A Yes.

Q Did you identify him in the court the last time?

A Yes.

Q As you sit here now, you have a present recollection of identifying this man with the brown suit?

A Yes.

Q Do you know his name?

A No.

MR. LEONE: Let the record indicate that the man with the brown suit is Alphonse Merolla.

Q Is that the man you say that you identified?

A That's one of the men that I identified.

Q I ask you again, Mr. Goberman, to search your memory and to search your conscience and I ask you, are you positive -- are you sure that you saw this man with the brown suit --

MR. LEONE: Stand up.

(Defendant Alphonse Merolla stands.)

Q (Continuing) -- at the McNamara Buick site on June the 5th, 1972, in that room?

A Yes.

Q Are you also positive that you identified him in this courtroom last year or earlier this year?

A Yes.

Q No doubt in your mind about that?

A No doubt.

Q You couldn't mistake this man, could you?

A I could. One is not perfect.

Q Have you?

A I don't believe so.

Q I will ask you again: Are you positive that you saw this man on June the 5th?

A Yes.

Q Mr. Goberman, could you tell me what this man was wearing -- this Alphonse Merolla -- at the time you saw him in this courtroom in January of this year -- is that when it was?

A Around January.

Q Sitting at that table, how was he dressed?

A More or less like he is dressed today. He didn't have on dungarees. He had on what appeared to be a suit at the time.

Q Are you assuming that or do you have a recollection that he was dressed in a suit at that time?

A That's what my recollection says, that he was dressed in a suit.

Q You are positive that he was here?

A If you ask if I would stake my life on it, I wouldn't because there is no value for me to do that.

Q I didn't ask you that.

A Otherwise I would say that he was wearing a suit and I identified him at that time.

Q Would you stake your life that he was in the McNamara apartment on June the 5th, 1972?

A Would I stake my life on it?

Q Yes.

A No, I wouldn't stake my life on it.

Q But you are positive, nevertheless?

A But my reputation says that he was there.

Q Your reputation says that he was here in January of this year?

A Yes.

Q And you identified him?

A That's right.

Q Suppose I told you that this man was not on trial the last time we were here, that he wasn't in this courtroom in January of 1974, that this is the first time he has ever been in this courtroom?

A Then I made a mistake.

MR. LEONE: Darn right you did.

Q Did you make a mistake on June the 5th, 1972,

sir?

THE COURT: Wait a minute.

Did he make a mistake here with respect to June 5, 1972.

Q I will ask you again, sir, are you positive that you saw this man on June the 5th, 1972, in the office of Mr. McNamara?

A Yes.

Q Just as you are positive that he was in this courtroom in January of 1972?

A If you are saying he wasn't in the courtroom on January 5th, then I can't be positive as to that, but as to the June 5th --

MR. LEONE: No further questions.

MR. RITCHIE: I just have one or two.

THE COURT: Yes.

EXAMINATION BY MR. RITCHIE:

Q When you testified in court, did you identify anybody at the table that you previously saw on June 5th, 1972?

A Yes.

Q Is that what you base your recollection on, having identified --

MR. LEONE: I will object to this, your Honor.

This line of questioning, I do not think is proper in view of the answers given by the witness.

THE COURT: He is entitled to examine.

What you say is that it has no probative force. That may be quite another matter.

MR. LEONE: Object to it on that ground, no probative force.

Q Did anybody --

MR. LEONE: May I have a ruling on it?

THE COURT: He may examine. I thought that I had ruled on it.

Q Is it your testimony that in January you identified someone at counsel table that you had previously seen on June 5?

A Yes, that's right -- I did.

Q If this individual had been present in the courtroom, would you have identified him as being present on June the 5th --

MR. LEONE: I object to that.

A I feel --

THE COURT: That is purely hypothetical.

MR.RITCHIE: I have no further questions.

THE COURT: Do you remember, Mr. Goberman, the circumstances of your identification at the last trial?

THE WITNESS: Well, it was -- they were sitting around the table like now and I was asked to identify everyone present in the room.

THE COURT: Do counsel have any recollection of what the question was?

MR. RITCHIE: Yes, your Honor.

MR. LEONE: I do.

MR.RITCHIE: We have it right here.

MR. LEONE: Page 1240, Judge.

(Transcript handed to Court.)

THE COURT: Well, the transcript shows this:

"Mr. Pollack, may the witness point them out individually, your Honor?

"(The witness had left the stand.)

"The Witness: One, two, three, four, five (indicating).

"Mr. Pollack: May the record reflect the witness has identified -- I think meaning pointed out -- Alphone Merolla -- that would be Alphonse M. Merolla, John DeLiso, John McNamara, Thomas McNamara, and, I am sorry, Mr. Leone, Rocco -- I think that was so you would lean over or something -- and Rocco, the gentleman with the glasses."

MR. LEONE: Your Honor, my notes from that

context that Angelo Merolla was never identified at the last trial as indicated by this witness today.

THE COURT: Yes, the listing does not contain Alphonse Merolla.

MR. LEONE: Yes.

THE COURT: Is that your point?

MR. LEONE: Yes.

THE COURT: Any further questions, gentlemen?

MR. LEONE: No.

MR.RITCHIE: No, your Honor.

THE COURT: You may step down, Mr. Goberman.

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MR. LEONE: So much for his power of observation.

MR. RITCHIE: Your Honor I think that Mr. Goberman very certainly, and I use that word in a very truly verbal form, identification Mr. Alphonse Merolla in court as well as the other individuals he identified previously.

I think there is a great difference in magnitude between what a man previously has done in a court room and what a man observes on a day when he surmised that his brother was being beaten.

I don't think they are in the same order of magnitude and impression upon a man's mind whatever. I think it is quite conceivable where has testified in a court previously and had been posed the same question, and had identified most of the individuals at a table not knowing an individual had not been on trial in a prior trial, he was asked if he previously identified this individual.

Knowing he had identified everybody he had seen, I think it is natural for him saying I did pick him out.

MR. LEONE: I didn't ask him. He said I picked him out the last time I was here.

THE COURT: He did say that. Now, what we can

all say, we had our recollections refreshed on -- other than Ms. Seltzer for the obvious reasons, because she wasn't here, and Mr. Alphonse Merolla who wasn't here -- that Mr. Goberman is very firmly positive in his testimony in words that are with great assurance and confidence which I take it makes you a little unable to pick out as your cross-examination, Mr. Leone, demonstrated, the occasions when it is clearly wrong and clearly right.

Because the theory is he is going to be clear about it and positive about it and he was just playing 100 per cent unqualifiedly wrong saying he picked out your client Alphonse Merolla at the first trial because he could not have done so because h was not at the counsel table.

And I am reasonably sure he was not in the court room.

MR. RITCHIE: Not as far as I know. I was here at all times. There were times Mr. Pollack wasn't but I was always here.

THE COURT: The real effect is ther you can see as Mr. Leone suggested to him, can you not be just as wrong about your identification -- but teh fact that you did testify to that same identification on an earlier occasion, when we have just

demonstrated to you or satisfied you or should have satisfied you that you were wrong.

And he adhered to the identifiecation. I think there is a tremendous difference, he either does or does not recognize the man.

Whether he remembers having pointed him out at a different time is a very different thing. It is a different order of recollection. Now he is being asked to remember whether or not on earlier occasion he had made just the identification that he made today and he answered with unqualified confidence that he had and he was unqualifiedly wrong. That means that his memory failed him or he was able to recall something that hadn't happened and at least was prepared to testify as to something that hadn't happened.

Mr. Ritchie had suggested that the explanation is a very simple one. That he assumed as he should not have that Mr. Merolla was on trial the last time. He recalled himself, and again he was wrong, as on that occasion having performed essentially the same sort of identification that he had just performed for us here, stepping down from the stand and going to the table and pointing out the people whom he said were upstairs.

Now, that is not identification testimony.

That if you wanted to translate it, is recalling a scene. Let's look at it.

He said enough to indicate to us that he recalled the scene of the earlier trial. While I had not recalled that he left the witness stand he did.

And did manage just as he managed it this time. If you look at the episode from the recollective point of view we have some indication that the recollection of the identification episode was wrong, that he was betrayed by his two confident assumptions that while defendants may have been dropped none were added. But one had and he was just wrong.

And I venture to guess that is usual, Mr. Goberman, when he is wrong he is very wrong. And he was very wrong this time.

But does that undermine the certainty of his recollection of Mr. Alphonse Merola, your client?

MR. LEONE: Yes, your Honor.

THE COURT: I think not.

MR. LEONE: Judge, let's go back to the photograph --

THE COURT: You didn't tackle him on the photograph, neither of you.

MR. LEONE: We had it from Agent McMullen,

procedure was so impermissibly suggestive as to give rise to a very substantial liklihood of irreputable misidentification."

Then the Court emphasized that the situation in Simmons was more or less an emergency situation, that they had to move quickly if they were going to apprehend the man who had perpetrated the bank robbery.

And among other things the Court said, "In the first place it is not --" I don't know whether that just happens to be the first thing they turned their attention to, but I think Justice Harlen usually works pretty carefully -- "In the first place it is not suggested that it was unnecessary for the FBI to resort to photographic identification in this instance."

And then they went on to explain about it really had no alternative. As it happens, the photographs shown in Simmons were group photographs which had in common the men who were -- none of whom were alone -- they were all group photographs, but they had in common I think the two petitioners were the ones who were in several of the pictures, and what they also had here is nobody in the bank missed out on the selection although each one of them was

we know that a fair -- I think we can agree a fair array of photographs was not shown to this positive man on the date that he picked out this man's photograph.

It has been demonstrated to this Court he is just the type of person who would say "Yep, that is him, I am positive."

THE COURT: We do have a hedge against that, that is a year earlier he had been shown the other array which included three people who were supposed to invite his accusing finger and they did not.

He said here that he had pointed the man out substantially as soon as he looked at it without hesitation, which is about what MR. McMullen had said.

What Simmon says on page 384 is "We are unwilling to prohibit his employment -- " that is the use of photographs before an arrest -- "Either in the exercise of our supervisory power or still less as a matter of constitutional requirement instead we hold that each case must be considered on its own facts and that convictions based on eye witness identification at trial following a pretrial identification by photograph will be set aside on that ground only if photographic identification

shown the picture separately, all of them made the same identification so that you had the sort of interferometer effect and they were able to say with great confidence that there was nothing wrong with the identification.

Now, here, what you really are up against in the case is a man is prepared to take his oath that he recognizes someone, and the defense objects to it being allowed to testify under oath to something which presumably he believes and he is prepared to say and which is relevant, relevant and highly material.

To keep that out I think you have to show some trespass to rights and here the trespass of the defendant's right as was suggested was he should not have been exposed to preselection.

Well, I don't think that here was there any trespass to his right. The witness was twice tested.

The first time on the first go around when he selected the picture of John DeLiso; and did not fall for any of the three fat men.

And the second time around he was shown pictures which did not show what Mr. Ritchie has

called Mr. Merolla's most prominent feature because he was seated at a table. And he selected him there without anybody pointing him out and certainly not from lookalikes -- but one wonders whether you would not have a real job on your hands in proving -- or getting the kind of line-up you are going to arrange for a man like that. I wouldn't be easy.

It wouldn't be easy no matter what you do. Certainly -- usually you resort to people in the building including some in the detention cells, and you are just not going to find a man as unusual as this.

And you are never going to be happy with it. It wasn't done.

MR. LEONE: Right.

THE COURT: I think still the big point -- I don't think there was anything unduly suggested here. The only real question is was it unnecessary, and I think it was unnecessary because I don't think that that is --

MR. LEONE: May I just interject one more thought. That the circumstances under which this photograph was shown to a prospective witness was such that it had to indicate that a suspect was in that picture.

It was a photograph which an FBI rushes to the witness' home or place of business depecting what is obviously a candid shot.

These people are not posing. It is taken under all the circumstances that there is another reason that it had to suggest to the witness that I have got the right fat man this time.

I just can't see under these circumstances and what the witness has demonstrated -- why, your Honor, I would -- I wouldn't bet 20 bucks to use the vernacular, that he is right about anything anymore.

THE COURT: Again, he is again letting his recollection of the scene betray him. I can't remember but I think all of the men at the last trial were sedately dressed.

I think you usually have your people sedately dressed.

MR. LEONE: I don't want to get away from the main point. It was also suggested that highly prejudicial to view the candid in shots in that atmosphere to a witness.

I think there being no exigency situation at all, some attempt at a fair array should have been made.

In view of the fact the man was under observa-

tion by the witness for at best a few minutes, under what must have been, according to the witness, trying circumstances, I think that had to be done.

If it was one of us we would cry out that it unfair. I don't know if the agent would have taken the same action had it been a member of his family, with all due respect.

Your Honor, it smells of unfairness, the whose situation does.

THE COURT: I don't think that is enough to suppress the evidence. I think it is up to you to decide whether --

MR. LEONE: I've got the usual problem, your Honor.

THE COURT: I do think this, of course, and I think it goes without saying, that it can't be used to reinforcedthe testimony on redirect.

In other words, maybe it would be quite improper to say and say have you ever at anytime, etc., etc.--

MR. RITCHIE: I agree.

THE COURT: Because I think on balance, the two photographic show ups even after Mr. Ritchie felt free to argue that they were totally fair cannot be fairly brought out on direct.

I think that defense counsel must have the opportunity to decide whether they want to use the pre-trial identification procedure to affect the identification or not.

The motion to suppress is denied.

We have had the jury under suppression for two hours and 21 minutes. Maybe we better have a little testimony for them to take home with them.

MR. RITCHIE: I suggest, if the Government can complete the testimony of its next witness --

MR. LEONE: That is?

MR. RITCHIE: Dr. Punturo. He's a kind of a busy man.

MR. LEONE: Judge, I would also like -- were you going to put Dr. Punturo on?

MR. RITCHIE: Yes.

MR. LEONE: Is that going to be the last witness?

MR. RITCHIE: It will have to be the last witness for the day or else I will put on Mr. Goberman if he has to continue.

I had almost no witnesses at the start of this afternoon and now I have too many.

THE COURT: Sorry, Mr. Leone.

THE CLERK: Bring the jury in?

THE COURT: Yes.

(At 4:25 o'clock p.m. the jury took its place in the jury box.)

B I A G I O P U N T U R O , called as a witness on behalf of the Government, having been duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. RITCHIE:

Q Sir, what is your occupation?

A Physician.

Q You are a medical doctor; is that correct?

A Right.

Q And how long have you been a medical doctor?

A About 21 years.

Q And where did you receive your medical training?

A Italy, University of Palermo.

Q The University of Palermo?

A Right.

Q What degree did you receive there?

A Physician and surgeon.

Q -When did you come to the United States?

A 1955.

Q And have you received any training or education in the United States?

A I had one year Residency in Medicine, one year Surgery and one year Post-Graduate course, Post-Graduate

course in 50th Street, a big hospital -- what is the name -- many years ago -- 50th Street.

Q 57th Street, Manhattan?

A Manhattan.

Q Roosevelt?

A No, no, this qualified me for a post-graduate course for Physician.

THE COURT: Bellevue?

THE WITNESS: No.

THE COURT: Kings County?

THE WITNESS: No, 50th Street.

Q On 50th Street, St. Claire's?

A No.

MR. LEONE: We will give up, we will stipulate.

THE COURT: It must have been a hospital.

MR. LEONE: Yes.

BY MR. RITCHIE:

Q You have had three years at any rate of training in the United States in Medicine and Surgery?

A Right.

Q Where do you practice at the present time?

A East Northport, Long Island, New York.

Q How long have you been practicing out in East Northport?

A About 10 years.

Q Where had you practiced before that?

A OH, I had a Residency in Psychiatry, too.

Q Where was that Residency?

A Central Islip in Long Island.

Q Now, on June 28th, 1972, did you have occasion to examine an individual known as Harry Goberman?

A Yes.

Q And as a result of that examination, did you have any document prepared?

A Do you want to repeat the question.

THE COURT: Did you prepare a memorandum?

Q As a result of that examination, did you have prepared any memorandum of what you had observed?

A Yes, it is not a -- it is a note, a little note, right.

Q And was that note produced as a result of the examination in and at the request of the individual, Goberman?

A Yes, yes.

Q I show you what has been previously marked as Government's exhibit 18 for identification and I ask you if that is the note that you prepared as a result of the interview?

A Yes.

MR. RITCHIE: May I have this marked, please.

THE CLERK: Yes, sir.

Document marked as Government's exhibit 20 for identification.

(So marked.)

BY MR. RITCHIE:

Q Now, is that a recordation of what you observed on that day?

A Yes.

MR. RITCHIE: I would offer this in evidence at this time.

VOIR DIRE EXAMINATION

BY MR. MEISELMAN:

Q Doctor, when is the last time if at all that you had ever spoken to Mr. Ritchie about the testimony you may be giving here today?

THE COURT: Is that relevant to the issue of its admissibility.

MR. MEISELMAN: Yes.

A Today.

Q Today?

And did you discuss the questions that Mr. Ritchie would ask you?

A Well, I was interested to be testifying today because it is hard for me for another day.

Q Did you give Mr. Ritchie any documents or papers?

A No, no.

Q Now, when you were interviewed were you interviewed by Mr. McMullen, a special agent for the FBI?

A No, today no.

Q At any time?

A No.

Q You never saw Mr. McMullen?

A Oh, yes.

Q Did you give him any papers or documents?

A No.

Q Now, doctor, is it fair to say that without looking at Government's exhibit 18 for identification you would have no recollection of what occurred on June 28th, 1972 concerning a Mr. Harry Goberman?

A Not in the particulars, I think I don't even recognize Goberman, but I remember approximately what happened.

Q Doctor, doctor, when a patient comes into your office for you to examine, it is usual and customary for you to make a record in your office?

A Right.

Q Did you do so in this case?

A Yes.

Q Do you have that card with you?

A I have it the last time, then I misplaced it. I can't find it. The last time I carried it with me.

Q At this moment you couldn't even identify Mr. Goberman, could you, sir?

A No.

MR. MEISELMAN: I object, your Honor.

MR. RITCHIE: Your Honor, I believe both individuals' testimony is properly admissible.

THE COURT: I am sorry, what?

MR. RITCHIE: I believe that both Mr. Goberman's testimony and the doctor's testimony is admissible.

THE COURT: The doctor recognizes that as being his report, does he not.

MR. RITCHIE: Yes, he does.

THE WITNESS: Yes.

THE COURT: And Mr. Goberman has testified to us that he went to Dr. Punturo.

Now does the doctor, Dr. Punturo, say anything about the date of the examination.

Do you want to show it to the doctor.

THE WITNESS: Yes, this is my signature and my

report.

THE COURT: Well, does it give the date of the examination.

MR. RITCHIE: Is there a date appearing on that note.

MR. MEISELMAN: The date of the examination.

(The witness then perused the document.)

THE WITNESS: June 28th.

BY MR. RITCHIE:

Q Did you prepare that note the same day that Mr. Goberman appeared at the hospital?

A I don't remember, I don't remember.

Q You don't remember?

A But I wrote that letter, I mean I wrote it in my record and I copied it from that.

MR. RITCHIE: Your Honor, it is dated June 28th, 1972.

THE WITNESS: Well, I don't recall the precise date.

BY MR. RITCHIE:

Q May I direct your attention to the second line, the third word on the second line.

Does that refresh your recollection as to whether it was prepared on the same date as it was typed and

dated?

A It must have been made the same day -- no, because I was alone inthe office that night, there was no secretary to type it.

Q Is this the date that Mr.Goberman was examined (indicating)?

A Right, right, yes.

Q It says, "Patient was today examined," and that would refer to this date, June 28th, 1972?

A Right, right.

Q So it would have been prepared on the same date as --

MR. MEISELMAN: I am going to object.

THE COURT: He insists, he said his secretary had gone home but --

MR. RITCHIE: Well, I will put another question, I will withdraw that question, your Honor.

Q Would he have been examined on that date, June 28th, 1972?

A Yes, yes, if I said "Today," it means for that day.

Q And this report would concern your examination of him on June 28th, 1972?

A Right, right.

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MR. RITCHIE: Your Honor, I would submit that this properly is admissible.

THE COURT: Yes, it will be received.

THE CLERK: It will be Government's Exhibit 18 in Evidence.

MR. RITCHIE: Your Honor, may I read this letter to the jury?

MR. MEISELMAN: Your Honor, the doctor is here and may testify as to what he observed himself.

THE COURT: I think you just explained to me that he has no recollection.

MR. MEISELMAN: I think that is clear.

THE COURT: But this is coming in now really as past recollection recorded.

MR. RITCHIE: Your Honor, may I read it?

THE COURT: Yes.

MR. RITCHIE (Addressing jury): The letter is captioned -- well, it is on the letterhead of Biago Punturo, M.D., 659 Larksfield Road, East Northport, Long Island, New York, 11731, and the telephone number given is AN 6-3381. It is dated June 28, 1972.

"To whom it may concern:

"Re" -- Regarding -- "Harry Goberman, 42 Ridge Road, Smithtown, New York.

"This is to certify that the above patient was today examined and he was found to have the following lesions most likely inflicted by traumatic action of blunt body:

"1. Erythemous areas over external aspect of the proximal end of legs and left shoulder.

"2. Swollen erythemous areas all over left arm and forearm.

"Very truly yours,

"Biago Punturo, M.D."

BY MR. RITCHIE:

Q Dr. Punturo, can you explain what the word "erythemous" means, what that word means?

A Erythemous, it is redness.

Q What is the external aspect of the proximal end of legs?

A The outside, extending over the outside and approximately the upper part of the segment, the upper part of the segment, the proximal.

Q So the proximal would mean the upper part of the leg?

A Approximately the upper part.

Q And the external aspect?

A It would be the outside, like this would be

outside (indicating) and this would be inside (indicating).

Q When you state there are erythemous areas over the external aspect of the proximal end of the legs, you are basically saying that there were erythemous areas on the hips?

A Right.

Q And the left arm and forearm would be the entire portion of the arm, or this, just the one particular part of the arm (indicating)?

A The upper part (indicating).

This would be the forearm and it would be this part (indicating).

This part, this would be the forearm (indicating), it would be from here to here over the arm.

Q This is the arm (indicating), and this is the forearm (indicating)?

A Right, sir.

Q And if you state that there were erythemous areas all over the left arm and forearm, you would be talking about the entire arm that we laymen talk about?

A This (indicating).

Q When you say "forearm," you always include this (indicating)?

A Right, right.

Q Now, with respect to these erythemous areas, did

you prescribe any medication for those particular areas?

A No.

Q On that date did you prescribe any medication for him, for Mr. Goberman at all?

A Yes.

Q Now I show you what has been marked as Government Exhibit 20 for Identification and I ask you if you recognize this document.

A Yes, that is my writing.

Q Is it a prescription form?

A Yes.

Q Does your handwriting appear on the prescription form?

A Right, yes, yes.

Q Is it for this patient, Harry Goberman?

A Yes.

Q And what is it that is prescribed?

A It is ointment for a skin condition, it is like for a fungus infection over the groin.

Q And that is called what, it is called what, for the record, please.

A Tinea cruris.

(At this point the witness indicated he was going to write on the exhibit.)

Q Please don't write on that particular document.

A Yes.

Q Now, with respect to these particulars, you also use the word here "lesions."

Can you describe what that word means?

A Yes, abnormality, something abnormal or some pathological sickness.

Q Now, with respect to lesions like these, is it your normal practice to prescribe any medication?

MR. MEISELMAN: I am going to object to that, if your Honor please.

THE COURT: Overruled.

Q Is it your normal practice?

A Shall I answer the question?

Q Yes, please answer that question.

A Well, usually if the contusion is severe I may give some medication for the swelling, usually enzymes; if I believe there is so much pain I would give something for this pain. In this case I did not think that there was severe pain or the swelling was nothing to warrant to give enzymes.

Q And in this prescription that you did give him, that was as a result of some other malady that you observed on his body?

A Right, yes.

MR. RITCHIE: Your Honor, I would offer this in evidence.

MR. MEISELMAN: May I see it?

(Document handed to Mr. Meiselman.)

MR. MEISELMAN: No objection, your Honor.

THE COURT: Received as Government's Exhibit 20 in Evidence.

THE CLERK: So marked.

MR. RITCHIE: Does your Honor wish to see it?

THE COURT: No.

MR. RITCHIE: I have no further questions.

(Cross-examination by Mr. Meiselman.)

Q Doctor, other than the Government's Exhibit which appears to be your report of June 28, 1972, did you have any independent recollection of what occurred on that date between you and somebody called Harry Goberman?

A Yes.

Q You remember him?

A No.

Q What else do you have besides that paper which has been marked as a Government's Exhibit?

A I remember that he said that he had been beaten up by other guys, other people, by three people.

Q Do you remember, did he tell you under what

circumstances?

A In the neighborhood, I don't remember, we had a few questions, you know, I wasn't too curious as to why.

(Continued on next page.)

Q Did you put this on office card?

A No, of course not. Why should I? It is not my business.

Q Doctor, when a patient tells you the circumstances under which he receives an injury, do you put that on your office card?

A I see the way it is there and I treat.

Q I didn't ask you that.

Do you put on your card what a patient tells you happened?

A No.

Q Doctor, I am not being derogatory when I ask this question and I do not want you to believe so: Are you listed in a phone book?

A I guess so.

Q In a regular phone book like everybody else?

A Yes.

Q Alphabetically?

A Yes.

Q Are you listed in the Red Book? Do you do any advertising under Physician?

A No, we cannot advertise.

Q I understand that. I am asking you a question so we can elicit the answer for the Court and Jury.

You don't advertise in the Red Book?

A No.

Q The only place you are listed is in a regular phone book under the name Punturo?

A Right.

Q If anybody wanted to look for a doctor the would have to go to the As and then go down to the Ps to find you?

A Right.

Q Doctor, mycolog cream is what you prescribed?

A Yes.

Q That's for infection, is it not?

A Fungus infection and repressed inflammation.

Q Inflammation due to infection?

A Yes.

Q Mr. Goberman had an inflammation due to an infection that you prescribed?

A Right.

Q That had nothing to do with anything else?

A Right.

Q Now, an infection that you prescribed mycolog cream, was a surface infection?

A Yes.

Q A skin infection?

A Yes.

Q Is that correct, Doctor?

A Yes.

Q Doctor, what is an ecchymosis?

A A small hemorrhage or hemorrhaging of the skin.

Q Would it be fair to say that an ecchymosis is a black and blue mark?

A Yes, it would be red in the beginning and then the blue mark later.

Q Erythema is less than a black and blue mark?

A Yes.

Q Erythema is basically a redness of the skin?

A Yes.

Q Doctor, do you agree with this definition of erythema: "A redness of the skin occurring in patches of variable size and shape. It can be caused by heat, certain drugs, ultra-violet rays and ionizing radiation."

A Yes.

Q You agree with that, sir?

A Yes.

Q Do you also agree with the term erythema gangrenosum --

A That has nothing to do with anything.

Q A feign or self-induced eruption.

Do you agree with that definition?

MR. RITCHIE: Objection.

THE COURT: I think he said that had nothing to do with my findings.

Is that what you said, Doctor?

THE WITNESS: Yes.

MR. MEISELMAN: May I have that exhibit, please?

THE COURT: Exhibit 18?

MR. MEISELMAN: Yes, your Honor.

Q Now, you saw the erythema on his left arm and forearm?

A Yes.

Q Did you notice anything about his left arm or forearm which was distinctive in any way, other than the redness that you described?

A Well, I described some redness and swelling.

Q When you looked at the arm, did you see anything about the arm that was different from any other arm -- Did it have any identifying scars or marks on that arm?

A No recollection of anything different.

Q And if that arm had a distinguishing feature about it, you would have remembered it?

MR. RITCHIE: Objection, your Honor.

THE WITNESS: If it was a tattoo, I wouldn't remember. It is no importance for me to know a tattoo or not.

Q You would have remembered it?

A No, tattoos are out of my mind. I do not recollect things that are useless.

Q Even a seven-inch tattoo covering the area that you are talking about?

A I look for pathology.

MR. RITCHIE: I believe the testimony was that it was on the right arm and not the left arm.

THE COURT: I think we have some earlier testimony about that.

MR. RITCHIE: Yes, but I do not believe there was a seven-inch tattoo.

THE COURT: All right.

Q Was the redness over the tattoo area?

A I don't know. I was saying that tattoo -- since there is not a disease -- I try to recollect things which are diseased. I wouldn't remember. It's not important for me.

Whether it is appealing or handsome or not, I don't remember that. I remember pathology.

Q Would you please be good enough to tell his

Honor and the jury what you remember as to the way he looked? Would you describe him.

A My recollection is middle-aged, apparently in good health, strong, well-built, articulate, that is it.

Q Blond hair or brown hair, blue eyes or brown eyes, short, tall?

A Average.

Q You would say average. Would you say my height

A He didn't impress me as being short or tall.

Q Was he heavy?

A Average.

Q Was he heavy?

A Well-built.

Q Would you estimate his weight.

A About 180, something like that.

Q I did not hear you.

A 180.

Q About 180. Was he alone.

A Yes.

Q Did you ask him to disrobe?

A Yes.

Q Doctor, did you testify under oath on January 15, 1974? Were you asked the following question and did you give the following answer, page 1307:

7 Punturo-cross/Meiselman

"Question: Doctor, with reference to your examination of Mr. Goberman, did you prescribe any medication?

"Answer: No. I might have told him to take aspirin if he had pain."

A Right.

Q You were asked that question and did you give that answer?

A Yes.

Q Did you know when you gave that answer to that question that you had given a prescription to Mr. Goberman for a fungus infection?

A I didn't remember the time or possibly I thought it was not important for this aspect, the medication was not intended --

Q When you were here last time, did you have your office card with you?

A Yes.

Q Was that medication shown on your office card?

A I am sure it showed it.

Q Are you sure or do you know, sir?

A I am sure.

Q It was shown on your office card?

A Yes.

Q And you testified that you had given him no medication?

A Well, it must have lapsed from my mind.

Q Until Mr. Ritchie refreshed your mind?

A Yes.

Q So that when you spike with Mr. Ritchie today, was it, you spoke about the testimony you would give here today?

A Yes, because I had forgotten about the prescription.

Q It wasn't your office card that refreshed your recollection or Government's Exhibit 18, it was Mr. Ritchie?

A Yes.

MR. RITCHIE: Objection as argumentative.

Q Tell me, Doctor, did you give him a full examination -- when I say, "him," I mean Mr. Goberman?

A No.

Q No?

A Just he asked for some rashes.

Q Did you look at him and observe what if anything you could observe that was different about him than a normal person in an examination?

A I was more concerned about the lesions.

Q Let us start again. You examined him for the

purpose of seeing what if anything was wrong with him?

A No --

Q What was the purpose?

A Because of the traumatic lesions, it was not for the heart or lungs or the brain.

Q Then you just looked at him?

A Yes.

Q And you put down what you observed?

A Right.

Q And if you didn't put it down, you obviously didn't observe it; is that right?

A I didn't examine him for heart disease, all right.

Q Erythema, redness or black and blue marks?

A Right.

Q Did you see any black and blue marks on Mr. Goberman's face, that includes his lips, cheeks and his forehead?

A Well, I might have seen a small one --

Q Not what you might have, did you, Doctor -- Did you see it?

A I think I saw a small one.

Q I believe you testified that you remember nothing about Mr. Goberman except what is Government's

Exhibit 18?

A Right.

Q I ask you to look at Government's Exhibit 18 and tell me if you mention any injury or anything to his face.

A Well --

Q Yes or no, Doctor, please.

A Well --

Q Is there any mention of his face in your report?

A No.

Q And you didn't remember except what's in your report; is that right?

A But --

Q Is that right, Doctor?

A Yes -- and no.

Q Did you notice any?

A May I say something?

Q Did you notice any erythema of the buttocks?

A No.

Q Did you notice any erythema of the abdomen?

A No.

Q Did you notice any erythema of the hands?

A No.

Q The only place you saw this redness was over what you call the "the extreme aspect of the proximal end of

the legs and the left shoulder," that would be here, Doctor, and here (indicating)?

A Not on the shoulder, on the knees.

Q And here (indicating)?

A Right.

Q And over the left arm and forearm, right?

A Right.

Q No place else?

A Most likely --

Q I beg your pardon?

A If it is a small redness like one, half an inch, I wouldn't write --

Q I am not asking you --

A You want to know the truth?

Q We all do.

A O.K.

Q Doctor, the reason I am asking you is because you have told me the only thing you know about --

A The most important is there.

Q -- is what is in here?

MR. RITCHIE: Objection.

A Right.

Q Do you have any recollection of Mr. Goberman other than Government's Exhibit 18?

MR. RITCHIE: Objection, argumentative in form.

THE COURT: Asked and answered and answered.

Q Do you recall, Mr. Goberman, complaining of any internal abdominal or chest injury?

A No.

Q Or pain of the abdomen or the chest?

A No, because I make sure there is no internal bleeding or internal injury.

Q Now, Mr. Goberman or this fellow who called himself Goberman, wanted you to put down your findings on a piece of paper?

A Right.

Q And you did?

A Right.

Q Did you ask him why?

A Yes, implied -- you know -- suing people who beat him up --

Q He told you that he wanted to sue the people who did this?

MR. RITCHIE: Objection, that is not the testimony.

Q In substance, is that what he said?

A Yes.

THE COURT: I cannot hear if you are going to

all three speak.

MR. RITCHIE: I'd object to the form of that question. That wasn't the man's prior testimony.

THE COURT: You may inquire.

(Continued on next page.)

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9pm

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CROSS-EXAMINATION

BY MR. MEISELMAN: (Cont.)

Q Would it be fair --

THE COURT: You may inquire.

Q Would it be fair to say doctor, if I may ask it again, would it be fair to say that Mr. Goberman told you in words and substance he wanted this paper for the purpose of bringing a law suit?

A Yes.

MR. RITCHIE: Objection, your Honor.

THE COURT: Overruled.

Q Now, doctor, did the Government -- by the Government I mean Mr. Ritchie or anyone connected with him, or the Government, ever ask you for a copy of your office record?

A I thought they had a copy.

Q Did he make a copy?

A I don't know. I don't think I gave it to them. Yes, yes, I think I gave it.

Q Who did you give it to, doctor?

A I think it was FBI agents, I think.

Q May I ask for the production of it?

MR.RITCHIE: I believe the doctor is mistaken. The only document I have in my possession that I've had

in my possession throughout the course of this case is the letter. If perchance the document was given by Dr. Punturo to Mr. McMullen, I am unaware of it but I will ascertain that.

THE COURT: I think there was something that Mr. Meiselman referred to indicating it had been used by the doctor in the testimony at the last trial.

MR. RITCHIE: I believe he testified he brought it.

MR. MEISELMAN: And that he used it.

THE COURT: I don't think -- I don't know whether he used it or not. He testified he had brought it. The question is did he leave it that time or was a copy made or was it marked for identification at that time? Or marked in evidence? I don't have a recollection.

MR. RITCHIE: As far as I recall the only document marked in evidence at the last trial was the letter.

THE COURT: Which is exhibit 18.

MR. RITCHIE: Yes, your Honor.

THE COURT: Very well.

BY MR. MEISELMAN:

Q Doctor, the injuries which you described in

3 Punturo-cross/Meiselman'

Government's exhibit 18 --

A Yes?

Q Could they have been caused by Mr. Goberman being involved in an automobile accident?

A No.

Q Could not?

A I don't think so.

Q You don't think so or it could not?

A Nothing for sure, 99 percent --

Q It's possible it could have been in an automobile accident?

A No.

Q It is possible it could have been caused by a fall?

A Yes.

Q It is possible, is it not, sir, it could have been self-induced?

A Yes.

Q Now, doctor, this business of a blunt instrument, was that your deduction from your examination of him?

A Yes.

Q Or was it because of what Mr.Goberman told you?

A No, my deduction. Otherwise if a sharp instrument it would penetrate.

Q On January 15, 1974, were you asked under oath this question and did you give this answer, on page 1310:

"Question: So you don't recall whether it was your deduction from the injuries or him informing you of how he was allegedly injured?

"Answer: Right."

Were you asked that question and did you give that answer?

A Can you repeat the question?

Q "Question: So you don't recall whether it was your deduction from the injuries or him informing you of how he was allegedly injured?

"Answer: Right."

MR. RITCHIE: Your Honor, I object. I don't think that fully and accurately --

THE COURT: Just a minute.

MR. RITCHIE: I don't believe that is a full exposition of the prior testimony with relation to this subject.

THE COURT: Let's go through it and then you can read the part you think is necessary to straighten it out.

Q Di you give that answer and were you asked that question?

A Yes.

Q Would you say, doctor, that your memory in January is better than it is now?

A The question --

Q Please, doctor.

A Yes, if I may say my mind --

Q Doctor, please.

By the way, going back to this for just a moment, when you make a physical examination of a person you've never seen before, and I assume you'd never seen Harry Goberman before?

A Yes.

Q Do you put down distinguishing characteristics about patients?

A Not in this case. It was late and he is not a patient of mine for any internal disease or heart condition -

Q You had another patient waiting with a heart condition?

A No. If he had a heart condition I would take a personal history, family history. This was just my opinion, it was contusions.

Q Your nurse wasn't there?

A No.

Q Your secretary wasn't there?

6 Punturo-cross/Meiselman

A No.

Q You don't usually type, do you?

A No.

Q Did you type this report?

A No.

Q Who did?

A The secretary typed it. I wrote a few notes and the secretary typed it.

Q When?

A I don't know. Do you?

Q It may have been a week later?

A One or two weeks later, right.

Q So, to the best of your recollection this letter could not have been given to Mr.Goberman on June 28th?

A Right.

MR. RITCHIE: Objection.

Q Would have been sent to him in the mail?

MR. RITCHIE: I object to the hypothetical questions.

THE COURT: No, he may inquire.

Q Is it your recollection as to how -it got to Mr. Goberman?

A Probably sent by mail.

Q Is it not customary when giving a medical report

to be used for the purpose of litigation that you charge an extra fee for the preparation of the report?

A Well, this is not a report, this is a note.

Q Yousent it to him by mail and you had your secretary or nurse prepare it?

A Yes.

Q There was no extra charge for this?

A I don't recall.

Q Did you send it to a lawyer or did you send it to Mr. Goberman?

A I didn't send it to a lawyer.

Q You are positive?

A I don't think so. To a lawyer I will send an extensive report.

Q What is your recollection?

A (No response.)

Q That you gave it to Mr. Goberman?

A Maybe I gave it, I don't know. Or he came to the office or picked it up. Or it was sent.

Q This becomes important, did you --

MR. RITCHIE: Objection.

THE COURT: Please.

Q If Mr. Goberman came to the office to pick it up, could you please tell us to the best of your recollectio

when that may have been?

MR. RITCHIE: Objection, your Honor.

A I don't remember. Who would remember about Mr. Goberman?

Q By the way, I believe you said you had another patient or patients who were waiting?

A I didn't say that. I think he was the last.

Q Do you employ anybody with the initials AP?

A Yes, my wife.

Q Does she work for you?

A Right.

Q Now, doctor, I believe you said that when you examined Mr. Goberman it was late?

A Yes.

Q To the best of your recollection, can you approximate how late that was?

A Around 8:30.

Q 8:30 that evening?

A 8:30, 9 o'clock.

Q In the evening?

A Right.

Q Now, doctor, if someone asked you for an extensive report in this case, would you give it to him?

A Yes. I don't like these patients but if they

come I take it.

Q In this case --

A I don't like the idea. They expect me to come here and lose the office hours for three days. It is undesirable.

MR. MEISELMAN: Thank you, no further questions.

REDIRECT EXAMINATION

BY MR. RITCHIE:

Q Dr. Punturo, do you recall how much you were paid for this examination?

A About $10 and maybe approximately $5 for the note.

Q Have you ever received any money from Mr. Goberman since then?

A No.

Q One point during your cross-examination, when Mr. Meiselman asked you about a bruise on the face, where did you see the bruise on the face if you recall?

A It might have been a small redness.

MR. MEISELMAN: Objection to what he might have had.

Q Do you recall him having some redness on the face?

A Yes, but not definitely. It is very small, not

definite that I could see exactly what it was and where it was.

Q Doctor, did you also testify that it was small, smaller -- I think you said than a half dollar?

A No.

Q A half inch?

A Small. A half inch, it is not important to the health of the patient so -- this was a note.

Q Where there was a small bruise or redness, you might --

MR. MEISELMAN: Objection as leading and argumentative.

THE COURT: Yes, he is your witness.

Q But, with respect to the injuries that you did note, how large were they?

MR. MEISELMAN: Objection, your Honor. I believe the exhibit speaks for itself. It has been read to the jury.

THE COURT: Yes, it has been.

Q Now, do you recall how this letter, Government's exhibit 18 came -- you don't recall how it came into Mr. Goberman's possession?

A No.

Q Now, you stated you don't like this type of

case, what do you mean by that?

MR. FISCHETTI: Objection.

THE COURT: What?

Q You don't like this type of case, what do you mean?

MR. FISCHETTI: Objection.

Q Do you normally --

THE COURT: Objection sustained. Let's move ahead.

MR. RITCHIE: All right, I have no further questions.

MR. LEONE: No questions.

MR. MEISELMAN: I do.

RECROSS-EXAMINATION

BY MR. MEISELMAN:

Q Doctor, if there would have been injuries to the face or skull, would you have taken x-rays?

A Yes.

MR. RITCHIE: Objection. That's way beyond the scope of redirect.

THE COURT: Overruled.

A Yes.

Q On January 15, 1974, did you testify under oath being asked the following question and giving the following

answer on page 1300:

"Question: This man Goberman, did he have any injuries on the forehead?

"Answer: No, I don't recall. I would request areas --" I presume that is x-rays, your Honor, "in that area anything to the skull, chest or abdomen."

Is that correct?

A If I thought he might have an internal injury, I would have taken care of it by hospital or x-rays.

Q Did he tell you he was beaten with blackjacks?

A I don't recall, he might.

Q You don't know?

A He might have.

Q If he told you that, would you have sent him to the hospital?

A If in the head, yes. Not in the arms.

Q On the chest or abdomen?

A Right.

MR. MEISELMAN: Thank you, sir.

MR. RITCHIE: No further questions, your Honor.

MR. LEONE: No questions.

THE COURT: We will adjourn now, members of the jury, until 10 o'clock tomorrow morning. Please

do not discuss the case with one another or anyone not on the jury until it is given to you to decide.

I am sorry we kept you locked up so long but it took us a longer time to untangle the complications we anticipated.

(The jury left the Courtroom.)

MR. GILLEN: With respect to subpoenaes, I can put a return date on my subpoenaes if I have some idea -

THE COURT: I think you had better ask Mr. Ritchie.

MR. RITCHIE: I don't believe we will go beyond Thursday. We might even finish up tomorrow.

MR. GILLEN: I will make them returnable Thursday.

MR. FISCHETTI: Are we working this Friday too, Judge?

THE COURT: We have to work sometime, Mr. Fischetti.

MR. FISCHETTI: It's tougher sitting here than arguing or even cross-examining, your Honor, believe me.

(A recess was taken at this time until October 16, 1974, at 10 o'clock a.m..)

* * * *

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA, :

-against : 73-CR-442

JOHN DE LISO, THOMAS MCNAMARA, ALPHONSE MEROLLA, and ALPHONSE M. MEROLLA, :

Defendants. :

----------x

United States Courthouse
Brooklyn, New York

October 16, 1974
10:00 o'clock A.M.

B e f o r e :

HONORABLE JOHN F. DOOLING, JR., U.S.D.J.

HENRY SHAPIRO
OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: DAVID RITCHIE, ESQ.
-and-
MARSHA KATZ, ESQ.
Special Attorneys, Task Force

RONALD FISCHETTI, ESQ.
Attorney for Defendant DeLiso

LEONARD J. MEISELMAN, ESQ.
-and-
MICHAEL GILLEN, ESQ.
Attorneys for Defendant Thomas McNamara

MS. MARION SELTZER
LEGAL AID SOCIETY
Attorney for Defendant A.M. Merolla

JOHN LEONE, ESQ.
Attorney for Defendant A. Merolla

Also present:

RICHARD MC MULLEN
Special Agent, FBI

(Time noted 10:25.)

(The jury took its place in the jury box at 10:25 a.m. o'clock.)

MR. RITCHIE: The Government will call Mr. Desmond J. O'Sullivan as its next witness.

D E S M O N D J. O ' S U L L I V A N, called as a witness on behalf of the Government, having been duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. RITCHIE:

Q Mr. O'Sullivan, what is your occupation?

A I am an attorney.

Q And how long have you been an attorney?

A Approximately six and a half years.

Q And you are presently in private practice?

A That is correct.

Q But at one time you were an assistant United States attorney; is that correct, sir?

A That is correct, in this district.

Q And you were also an assistant district attorney out in Suffolk County?

A That is also correct, yes.

Q Do you know an individual named Thomas McNamara?

A Yes, I do.

Q And he is present in this courtroom, is he not?

A I believe I saw him earlier.

MR. GILLEN: Your Honor, his identification is completed.

BY MR. RITCHIE:

Q Have you ever represented him in any legal matters?

A Yes, I have.

Q And when was that?

A I initially represented him on a problem he was having with the construction of the McNamara Buick-Pontiac building, a new building on Nesconsett Avenue.

Q My question was when.

A Roughly about -- I began representing him I think on or about June 7, 1972 I believe it was.

Q On that date did you have occasion to interview Mr. Thomas McNamara?

A I believe it was in the evening of June 7th that I first discussed the case with him.

Q At the time that you interviewed Mr. McNamara, who if anyone else was present?

A Can I possibly refer to my notes on this, it is a long time?

Q Yes, you may.

A My notes indicate that I met with Kevin McNamara James McNamara, John McNamara -- those are the sons of

Mr. THomas McNamara -- and Mr. Thomas McNamara and the meeting occurred at James McNamara's apartment located in Port Jefferson, on Main Street, and that also present was a detective, Thomas Gill, of the Suffolk County homicide squad.

Q At that time did you discuss a complaint of Mr. McNamara with respect to an individual named Harold Goberman?

A We were discussing basically that he was having a problem with his contractor, Mr. Goberman, that is correct.

Q Now, during the course of this interview, did Mr. McNamara at any time complain of any threats of violence on the part of Mr. Goberman?

A Did he complain to me personally?

Q Yes.

A Well, I knew they apparently were having some difficulty --

Q My question is did Mr. McNamara, Mr. Thomas McNamara during the course of that interview, ever mention Mr. Harold Goberman had made any threats of violence?

A Not that I can recall at that meeting.

Q Did Mr. McNamara at that meeting at any time complain that Mr. Goberman had kicked him?

A Well, that would be a difficult question for me to answer because there were several people there ar the

meeting, there were various conversations.

Did he complain to me personally at that time?

Q Yes.

A The answer is no.

Q Did anyone complain to you personally at that time with respect to any violence directed toward Mr. McNamara on the part of or by Mr. Goberman?

A Well, again I don't know exactly what you mean by "violence," I knew they were having pretty bad arguments. As far as any relationship of a threat specifically occurring to do bodily harm to Mr. McNamara, not at that time.

Q Was any mention made of any assault in any manner by Mr. Goberman or Mr. McNamara by Mr. McNamara or anyone else present at that time?

A Absolutely not.

Q Was any mention made of any incident where Mr. Harold Goberman spat upon Mr. McNamara by Mr. McNamara or anyone present at that meeting at that time?

A Not to the best of my recollection, not on June 7th, no.

Q Now, as a result of that meeting, did you have occasion to speak with an individual from the Suffolk County district attorney's office?

A I spoke with two individuals from the Suffolk

County District Attorney's Office.

Q As a result of that meeting?

A As a direct result of that meeting.

Q Which two individuals?

A Mr. Edward Connors, C -o-n-n-o-r-s, who was formerly the chief assistant district attorney in Suffolk County and was at that time I guess the senior trial assistant. I spoke with him. He was attached to the County Court Bureau.

And I also spoke with Mr. Jack Erlich, who was chief of the frauds bureau of the District Attorney's Office.

Q Whom did you speak to first?

A I don't recall in what order, but I spoke to them both as soon as I could contact them, which was early the next day.

Q Was a meeting set up between yourself and any of these two district attorneys?

A Yes, a meeting was set up with Mr.Jack Erlich in my office, that is correct.

Q And how long after the June 7th interview with Mr. Thomas McNamara was this interview with Jack Erlich?

A If I may refer to my notes, Mr. Ritchie?

Q Sure.

A The meeting occurred with Mr. Jack Erlich and

Detective James Brennan, I believe attached to either the rackets bureau or to Mr. Erlich's fraud squad, at about 5:00 o'clock in my office, 5:00 p.m. in my office on June 9, 1972.

Q And was a complaint made to Mr. Erlich?

A Well, I had asked Mr. Erlich if he and his squad could evaluate the possibility of fraudulent requisitions being submitted and false notarizations, things of that sort, because it was my belief that Mr. Goberman was taking kickbacks from the subcontractors on the case (sic).

Q And that was your belief at that time?

A That was my opinion at that time.

Q Did you communicate that belief with supporting documentation to Mr. Jack Erlich?

A The purpose of the meeting was to bring our checks and our requisitions there for Mr. Erlich and his detective, whom I believe is a certified public accountant, to examine all of this so they could give us an expert opinion. I didn't feel I was qualified to render that kind of an opinion.

Q Did you present documentation?

A Yes, we did.

Q As a result of that interview was any action taken against Mr. Goberman?

A Do you mean did the district attorney's office institute any prosecution against him?

Q Yes.

A Not that I know of.

(Continued next page.)

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Q During the course of that meeting with Mr. Erlich, did either yourself or Mr. McNamara at any time complain of any violence or any assaults or any spitting by Mr. Harold Goberman directed towards Mr. Thomas McNamara?

A No, that was not the purpose of the meeting.

Q Was that or wasn't that done?

A No, I never complained of it and to my personal knowledge no one else did either at that point.

Q Were you aware at the time of the June 7th interview that Harold Goberman had made a complaint to Thomas Gill about violence directed towards himself by Thomas McNamara?

A No, this is the first I know of it, I --

Q Mr. Gill never informed you of that?

A If he did, I have no recollection of it.

Q And Mr. McNamara never informed you of that?

A That Mr. Goberman complained to Detective Gill that Mr. McNamara was threatening him?

Q Yes.

A Not to my knowledge, Mr. Ritchie.

MR. RITCHIE: I have no further questions, your Honor.

(continued on next page)

CROSS-EXAMINATION

BY MR. GILLEN:

Q Mr. O'Sullivan, how long have you known John McNamara?

A Since 1962, I believe.

Q What about James and Kevin?

A I think I first met Jim McNamara around 1964 and Kevin probably around the same time.

Q Are there other brothers?

A Yes, there is another brother, Tom, Jr., who is a United States Attorney in North Carolina, I believe.

Q How long have you known Tom, Jr.?

A Probably about eight to ten years. I don't know him that well because he doesn't live in the area.

Q Well, about how long do you know him?

A I know him about the same time as I know John.

Q That is another brother, other than Jim?

A That is right.

Q You are saying you were brought into this matter on June 7th?

A That is correct.

Q At that time were you given a copy of a contract?

A Yes, I was.

Q Was it a large contract?

A It was extremely large, I believe several hundred pages.

MR. GILLEN: May we have the exhibit, please?

(Document handed to Mr. Gillen.)

Q Now, is it fair to say, Mr. O'Sullivan, that as far back as 1972 most of your experience as an attorney was in the field of criminal law?

A That is correct, sir, trial work basically.

Q It is still the same?

A It is still basically the same, right.

Q So while you are conversant in all areas of law, basically you are a criminal lawyer?

A That is basically correct, yes, sir.

Q Now, sir, how long did it take you to familiarize yourself with that --

MR. GILLEN: What is the exhibit number, Mr. O'Sullivan?

MR. RITCHIE: It is on the second page, sir.

MR. GILLEN: Government's Exhibit 11.

A It took me several days, Mr. Gillen, as a matter of fact at that time I was fairly busy and I had to stay up late at night to read through this thing, several nights.

Q Did you have other documents that you had to put together?

A There were checks and apparently two or three requisitions that were involved and payments to sub-contractors at that time, yes, sir.

Q Did you have to check those checks against the requisitions to make a determination as to what was paid and what was owed, etcetera, etcetera, etcetera?

A I was doing this basically with Mr. McNamara's accountant.

Q That was really what you were called in for, is that correct, at that time?

A Well, I was called in by Mr. McNamara at the time because he felt that Mr. Goberman was not paying the sub-contractors and that he was falling behind, and Mr. McNamara was advancing monies so Mr. Goberman could meet the payrolls. At that time he just didn't have the money to pay the contractors and I believe the carpenters were even threatening to walk off the job if they were not going to be paid, so he was worrying whether his job was going to be completed or not.

Q You said in answer to Mr. Ritchie's question that in your opinion at that particular time that Mr. Goberman was taking kickbacks?

A That was one of the areas, yes.

Q You said in your opinion at the time he was

taking kickbacks?

A Yes, I did.

MR. RITCHIE: Your Honor, I object to that question and ask that the answer be stricken.

Any opinion he has is based on --

THE COURT: No, it was brought out on his direct questioning.

MR. GILLEN: That is correct, your Honor.

BY MR. GILLEN:

Q Is that still your opinion, from what you know of this?

A Yes, it is.

Q Now, Mr. O'Sullivan, did you ever meet Harry Goberman personally?

A Yes, I have.

Q When for the first time did you meet Harry Goberman personally?

A If I may refer to my notes, Mr. Gillen?

Q Please do.

A I met Mr. Goberman for the first time on the morning of June 8th and it was at or about 10:30 or 10:45. My notes indicate 10:45 I met him.

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O'Sullivan-cross/Gillen

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Q Where was that you met him?

A I met him in the basement of a private residence located in Hauppague which was, to my understanding, the basement was the headquarters for Len-Al Construction Corporation.

Q That is June 8th, 1972?

A That is correct.

Q Was anyone with you when you met with Mr. Goberman?

A John McNamara, the son of Thomas McNamara accompanied me there because I didn't know where the office was.

Q How long did the meeting with Mr. Goberman take?

A My notes indicate we arrived there at or about 10:45 a.m. and they indicate I left there and returned to the job site at about 12:15, or fifteen minutes after noon-time.

Q Incidentally, these notes, are these contemporaneous notes?

A They were made probably on the very day or within twenty-four hours.

Q What was the purpose?

A I was keeping them for the purpose of billing out the time to Mr. McNamara ultimately.

Q You keep the notes as accurate as possible?

A Yes, also to try to refresh my recollection of what occurred on a given date.

Q What was the purpose of the meeting with Mr. Goberman at Len-Al on June 8th?

A As I mentioned before, Mr. Goberman was unable to pay his -- the people who were performing labor on the site and Mr. McNamara was ready to advance them money to meet his payroll. I went to pick up a check from Mr. McNamara and to bring it to Mr. Goberman and also I was going to try to arrange a time when I could examine Mr. Goberman's books and records to ascertain if he was paying the sub-contractors as required to.

Q Did you have any problem examining his books and records then?

A On the 8th of June he agreed to show them to us, but I believe later that day I got a call from Mr. Shallos and I think we set up a meeting on that Friday, I don't recall when. We were to sit down and he was to show me all the checks to indicate the payments to all the sub-contractors.

Q Did he show you?

A Ultimately we had a meeting with Mr. Shallos, in his office, when I did go over all the checks.

Q Did you actually give Mr. Goberman a check on June 8th?

A Yes.

Q How much was the check, do you know?

A I don't recall offhand.

Q A number of thousands of dollars?

A Certainly in the couple of thousand dollars. I could look it up.

Q Excuse me one moment.

(Pause.)

Q Would the figure twenty-four hundred and forty-six dollars refresh your recollection?

A That sounds familiar to me, Mr. Gillen, yes.

Q Incidentally, this meeting with Mr. Goberman, was it a friendly meeting?

MR. RITCHIE: I must object. Mr. O'Sullivan has become the defendant's witness.

THE COURT: What?

MR. RITCHIE: I believe the witness has become Mr. McNamara's witness at this point and I object to leading.

MR. GILLEN: He is a witness in the case. He's nobody's witness.

THE COURT: If you examine him on matters not covered on direct, you make him your witness, for the purpose of determining what kind of question you are

permitted to ask him --

MR. GILLEN: That I accept, but not the way Mr. Ritchie said it.

THE COURT: Mr. Ritchie said it in a very conventional way.

MR. GILLEN: Then I apologize. It didn't sound conventional to me.

THE COURT: Perhaps you don't have my taste for convention.

BY MR. GILLEN:

Q Did Mr. Goberman have any marks on him on June 8th, 1972?

A Would you be more specific?

Q Marks, visible marks.

A Do you mean --

Q Did you see any marks?

A I saw Mr. Goberman, he appeared to be normal to me. I didn't see any marks. You mean marks like there was violence done?

Q Yes.

A No, I wasn't specifically looking for that. I was going to meet with him. He appeared to me to be a perfectly healthy person at the time.

Q How was he dressed, do you recall?

A It was a warm day and in fact I think he had the back door of the cellar open. He was dressed in slacks and a T-shirt or a very light sport shirt.

MR. GILLEN: May I have this marked?

THE CLERK: So marked for identification as Defendant McNamara's Exhibit AP.

(So marked for identification.)

Q Did he have any bruises on his facial area, cheeks, nose?

A Absolutely not.

Q Did he complain of any beating by John McNamara?

A No, they were quite friendly.

Q You know that John McNamara is a defendant in this case?

A Yes.

Q I show you Defendant's Exhibit AP for identification and as a matter of fact you said there in that letter well over eighteen months ago how he was dressed, so it is not just now that you recall how Mr. Goberman was dressed?

MR. RITCHIE: Objection.

THE COURT: The objection must be sustained.

MR. GILLEN: May I have this marked?

THE CLERK: So marked for identification, Defendant McNamara's Exhibit AQ.

(So marked for identification.)

Q Do you recall that (indicating)?

THE COURT: I said the objection is sustained.

THE WITNESS: I'm sorry.

Q Mr. O'Sullivan, I show you Defendant's Exhibit AQ for identification. Do you recognize that?

A Yes.

Q What is that?

A That is the photocopy of the check I delivered to Mr. Goberman on June 8th.

MR. GILLEN: I offer this in evidence, your Honor.

MR. RITCHIE: May I see it, your Honor?

THE COURT: Certainly.

MR. RITCHIE: My only objection is I believe this is in evidence already. The original of this document --

THE COURT: It has some familiarity.

MR. GILLEN: It might be in the package.

THE COURT: Wasn't it particularly referred to within that --

MR. RITCHIE: I believe this might have been referred to.

MR. GILLEN: I withdraw my offer then.

BY MR. GILLEN:

Q Now, on June 8th, did Mr. Goberman engage in

conversation with John McNamara?

A Yes, he was talking to him almost continuously for the entire hour and a half subject to many telephone calls which interrupted.

Q Was there any visible animosity between Mr. Goberman and Mr. McNamara?

A No, they were laughing and joking around.

Q You told us of a meeting on June 9th, 1972. I believe you said it was at your office, is that correct?

A That is correct, Mr. Gillen.

Q Where is your office located, or, was it located at that time?

A It was then, and still is, located at the Hillside Professional Center, Route 25A,East Setauket, 11733.

Q John McNamara was present at that meeting?

A Yes.

Q Tell us, please, from your notes, do you have any recollection as to what time you first saw John McNamara on June 9, 1972?

A Well, my notes indicate that I had a meeting with the McNamaras and their accountant which commenced about three-thirty. I first saw John and Jimmy earlier. I think Jimmy came in to the office first. They came in one by one. Jimmy, John, and Mr. McNamara and I think the last one was

John Sena, the accountant.

Q Do you have any present recollection of what time John McNamara came to your office June 9, 1972?

A My best estimate was probably in a half hour prior to the start of the meeting, certainly not more than an hour before.

Q At that meeting, Mr. Erlich you described was there, was that Exhibit 11 discussed, the contract?

A I am sure it was, but I don't honestly recall, Mr. Gillen.

Q Did you have a lot of documents at that meeting?

A Yes.

Q Were they discussed, documents and checks?

A Right. There were two requisitions in particular that Mr. Brennan was directing his attention to.

Q That was the purpose of the meeting, was it not?

A My note indicates if I may again, when Detective Brennan and Mr. Erlich joined the meeting, they were examining requisitions for possible fraud, a false notary, and falsifying business records.

MR. GILLEN: May I have these marked for identification?

THE CLERK: Document marked for identification as Defendant McNamara's Exhibit AR.

(So marked for identification.)

Q Is this a true copy, Defendant McNamara's Exhibit AR for identification, a sheet of your notes with the date June 8 and June 9?

A Yes, it is a photocopy made from the original which I have in my file.

MR. GILLEN: offer this into evidence.

MR. RITCHIE: May I see it?

THE COURT: Yes.

MR. RITCHIE: My objection to this would be -- I have no objection to Mr. O'Sullivan using any document to refresh his recollection, but I believe that this doesn't fit within the category of a regular business record under 28, U.S. Code, Section 1732.

MR. GILLEN: I can lay a foundation.

THE COURT: It has not been done.

MR. GILLEN: I could do that.

THE COURT: Yes.

BY MR. GILLEN:

Q Mr. O'Sullivan, Defendant McNamara's Exhibit AR for identification, a copy of your notes, are they records kept in the regular course of your business?

A I keep them in every file, Mr. Gillen.

Q Are they records that are filed in the course of your business?

A Yes, every file in my office has these records.

Q Did those records come from your files?

A Yes.

Q In fact, you use it to get paid, is that correct?

A That is correct.

Q Which is an important part of your practice?

A The most important part.

MR. GILLEN: I offer it in evidence.

MR. RITCHIE: I still object. He has not met the requirements of 28, U.S. Code 1732.

THE COURT: In what respect?

MR. RITCHIE: There has been no testimony whatsoever with respect to the preparation of these documents, when they were prepared with relation to the events recounted.

THE COURT: I think Mr. O'Sullivan did say something about that.

MR. RITCHIE: He only testified to the keeping and maintenance.

THE COURT: No. Earlier, not just now, earlier he was asked when the notes were made.

MR. RITCHIE: Then I would have no objection except on the grounds of relevance. I don't see how it is relevant to the --

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MR. LEONE: Must we have a speech every time?

THE COURT: I think Mr. Leone and others also have a right to voice an objection.

MR. LEONE: I was objecting to the manner in which counsel makes his objection.

THE COURT: He must do his duty, you know that.

THE CLERK: Received, your Honor?

THE COURT: Yes.

THE CLERK: Defendant McNamara's Exhibit AR in evidence.

(So marked in evidence.)

(continued on next page)

Q If you recall, Mr. Ritchie asked you on your direct testimony, I think you referred to two times meeting with James McNamara, in the apartment I believe on June 7th, and the meeting in your office with Mr.Erlich, and he asked you at that time did anyone there tell you of any threats. Do you recall that your answer was no?

A That is correct.

Q My question, Mr. O'Sullivan, was at any time thereafter, did the McNamaras tell you of threats?

MR. RITCHIE: Objection.

THE COURT: Yes or no only.

A Yes, they did.

THE COURT: Yes?

Q And, can you tell us please what were the threats they told you about.

MR. RITCHIE: Objection unless we fix which Mr. McNamara.

THE COURT: And on what date.

MR. RITCHIE: Yes, and on what date.

Q Fine.

Do you know what date, Mr. O'Sullivan?

A Yes, approximately a day or two after June 16th

Q Who did you meet with?

A I am certain I met with Jimmy McNamara.

I think I also spoke with John McNamara.

Q That is the same John McNamara who is a defendant in this case?

A Yes.

Q Is that the same John McNamara that was present at the time of the meeting in Mr. Erlich's office?

A Yes.

Q Is that the same John McNamara present in the meeting in James' office?

A Yes, that is correct. His apartment, Mr. Gillen.

Q What did he tell you about the threats?

MR. RITCHIE: Objection, your Honor. This is incompetent hearsay.

THE COURT: Well, would you step up, gentlemen.

(The following took place at side bar.)

MR. GILLEN: If I may, Mr. Ritchie has -- well, I will wait.

THE COURT: I think this witness was called primarily to show that no complaints of violence were ever made.

MR. RITCHIE: No, he was called with respect to a meeting on June 7th, your Honor -- testimony concerning threats in the latter part of June I think is highly prejudicial to the Government --

MR. GILLEN: What?

MR. RITCHIE: The motives for the McNamaras to fabricate threats was certainly present on June 7th, but the McNamaras at that time attempted to use a court complaint and it was only way back at the end of June after Junr 16th that the McNamaras came up with the allegation of threats. It was stated to Mr. O'Sullivan by a nonparty, stated by a party to this cause of action by a conspirator, your Honor, but co-conspirator's testimony is merely a form of vicarious admission. An admission is only admissible when offered by the parties.

THE COURT: Against a party who had made the admission.

MR. RITCHIE: This is nothing more than a self-serving statement. I can see your Honor's point, the statements were made and it is not being offered for its truth, but I think in this case we are -- Mr. Harold Goberman going to the police in Suffolk County on June 5 and at that time complaining of violence on the part of Mr. McNamara.

MS. SELTZER: The entire jury is listening.

MR. GILLEN: I think it was February 15 or March 15, 1973 is the alleged fabrication by

Mr. McNamara. We are talking about June of 1972. And I would like to know, does the Government contend his threats were fabricated and no threats ever occurred?

MR. RITCHIE: I don't vouch for your witnesses.

MR. GILLEN: I am not sure of the Government's contention. He is giving the jury the impression there were no complaints ever made. He stands there and says fabrication by the McNamaras of June 16th. How in God's name could Thomas McNamara know on June 16th he was going to be called into the strike force office and questioned by Mr. McMullen and Mr. Ritchie in March of 1973?

THE COURT: I am afraid that the testimony must be heard, Mr. Ritchie, because you see there really wasn't any point in calling Mr. O'Sullivan as a witness on behalf of the Government except to show the absence of any threats of violence by Goberman against Mr. McNamara.

Now, I think to say that in this critical period of June 5 to June 28, that Mr. O'Cullivan cannot be asked whether threats were reported to him as having been made later on would be to deny to the defendants an opportunity to meet the main thrust of the witness' evidence.

MR. RITCHIE: Yes, your Honor.

THE COURT: Now, I think it is true that -- I am afraid that this permeates the case on both sides. All of these charges and countercharges of threats of violence could be found by the jury to be so grossly exaggerated, and they don't much care for either side of the case and their verdict would be a plague on both your houses --

MR. RITCHIE: I understand.

THE COURT: But, I am afraid I must allow it.

MR. GILLEN: Thank you.

MR. RITCHIE: I would only say that the Government by your ruling has denied the right to cross-examine the declarants.

THE COURT: Well, I am afraid you invited that because you asked whether there were any complaints of threats at all at the meetings.

MR. RITCHIE: Your HOnor, I would like to note on June 16th, Mr. O'Sullivan terminated his representation with the McNamaras.

THE COURT: All of this goes to other matters. Mr. McNamaras way with lawyers is strange indeed. We will see.

MR. RITCHIE: Yes, your Honor.

MR. GILLEN: Thank you, your Honor.

Q My question was, what was said about the threats?

HS:jm
T3amR1

THE COURT: If anything?

A James McNamara told me that they were locking up all the apartments, that Mr. Goberman had threatened to blow up the garage. The apartments are up over McAllister Motors, an active dealership. He had threatened to blow up the garage and threatened to get him with a shotgun and he was scared and his brother John was scared.

Q Now, in and during this time, you knew the McNamaras -- you were friendly with some of the sons?

A I was very friendly with Jimmy McNamara. He was one of my best friends.

Q During this period of time, June, July and August of 1972, did you notice any change in the lifestyle of the McNamaras?

MR. RITCHIE: Objection, your Honor.

THE COURT: That seems rather far afield.

Q Did you observe the McNamaras taking unusual precautions?

A Yes, I did.

MR. RITCHIE: Objection.

Objection, your Honor, to the leading.

Objection on the grounds of relevance.

THE COURT: I'm afraid the harm has been done,

Mr. Ritchie. I can ask the jury to erase it from their minds. I do not see how they could, if they say they managed to.

The question at least eliminated the necessity for asking other questions to get to the point in order to avoid leading.

Motion to strike is denied.

MR. GILLEN: Thank you.

BY MR. GILLEN:

Q You said there was a Detective Thomas Gill at that meeting; is that correct?

A On June the 7th I met with Tom Gill, that is right.

Q Can you tell us, please, did you have a conversation with Thomas Gill on that day?

A On the evening of June the 7th I had a conversation with him, yes.

Q Was that conversation out of the presence of the McNamaras?

A I left Jim McNamara's apartment to discuss with Tom McNamara exactly who Mr. Goberman was --

Q With Tom Gill?

A Excuse me, that is correct.

Q Did you learn anything of the background of

Mr. Goberman?

MR. RITCHIE: Objection as to any testimony concerning conversation with Mr. Gill on the grounds of hearsay, your Honor.

THE COURT: Yes, that is what I was trying to recall.

MR. GILLEN: It is a foundation to my next question.

THE COURT: You may answer that exact question, yes or no.

BY MR. GILLEN:

Q Can you answer the question?

A Might I have it read back?

MR. GILLEN: Yes, would you please, Mr. Shapiro?

(Question read.)

A (continuing) Yes, I did.

Q Did you communicate what you learned to Thomas McNamara?

A Yes, I eventually did.

Q What did you tell Thomas McNamara about the background of Harry Goberman?

MR. RITCHIE: Objection, your Honor.

THE COURT: Well, did you tell Thomas McNamara?

THE WITNESS: I do not recall exactly when,

your Honor, but I am sure it was during the time that I was representing him, which was a period of approximately eight days. It was during that period that I told him.

THE COURT: Approximately eight days?

THE WITNESS: Right.

THE COURT: From June 7th --

THE WITNESS: From June the 7th and I believe I terminated my relationship with Mr. McNamara on June 16th -- within a few days of my initial meeting.

THE COURT: I think I will excuse the jury for a moment so we can discuss this.

Please do not discuss the case with one another or anyone not on the jury until it is given to you to decide.

(Jury leaves courtroom.)

THE WITNESS: Do you want me to leave?

MR. GILLEN: I have no objection to his being here.

THE COURT: I think it is best. Do not go far.

THE WITNESS: I will go right by the door.

(Witness leaves courtroom.)

THE COURT: What is your theory of admissibility as to this?

What I cannot remember is whether Mr. Gill was at any time familiar with the -- what's the name of the case?

MR. GILLEN: Sommers.

He was one of the detectives on the case.

THE COURT: The reason for admitting it would be that the jury might well think that having heard that, people might be induced to think that Goberman was a sort of outlaw and could be abused with impunity.

MR. GILLEN: That is not my purpose, your Honor.

THE COURT: The other reason for it would be to show that it would have firmed up Mr. McNamara's belief that he had fallen into the hands of a very evil man indeed and moved him to resolve every rational and every irrational doubt against him and to move heaven and earth to get him off the job, including people who might be thought to be familiar with the same realms of society in which, according to Gill if he said what he might have said, Goberman functioned.

In other words, the reason for permitting it, despite it's hearsay character, is because it could have loaded the mind of Thomas McNamara and John McNamara until it was ready to go off as with a high explosive charge and furnish a reason for the conduct

of men who otherwise seem to be -- at least on the visible record -- businessmen conducting a family business of substantial scale in a once quiet Long Island town.

That's the only relevancy that I see.

If you recall the charge that was given the last time, the jury was instructed in no uncertain terms that violence and threats of violence do not authorize countervoilence, but authorize going to the police, and nothing more.

Now, we are not talking about self-defense here.

MR. RITCHIE: Your Honor, if I may?

First of all, we are really talking about Thomas McNamara's state of mind. I am faced with a state of mind and without a body to cross-examine on that state of mind.

THE COURT: What is that?

MR. RITCHIE: We are talking about Thomas McNamara's state of mind and I am faced with the state of mind --

THE COURT: I do not know if you listened to a word I said.

MR. RITCHIE: I have.

THE COURT: What I have said is that I would

regard this as very powerful Government evidence. If the defendants insist on offering it, I do not see how I could keep it out. If you had offered it, well I do not know.

MR. RITCHIE: Your Honor, I have a great deal of respect for your abilities, but I do believe that the jury is going to hear this -- going to hear it from a man like Mr. O'Sullivan and from all I know and it is apparent to the jury, highly respectable and of integrity, they will learn that he was informed by another individual of the reputation of Harold Goberman and that he then communicated that to Mr. Thomas McNamara. I think that is irrelevant because we will have testimony later in the case that Mr. McNamara -- Mr. Thomas McNamara communicated to Mr. Shea on the date previous -- on June 6th -- facts concerning Mr. Harold Goberman's criminal background. I do not think this was a new revelation.

I think furthermore this is really a declaration of Detective Thomas Gill. Detective Thomas Gill will be on the stand. Detective Thomas Gill will be examined as to his opinion of Mr. Goberman through his investigation. I do not have a citation now, your Honor, but I will get it for you. I did not expect this

problem to come up at any rate until Mr. Thomas Gill was called, which I expect to occur tomorrow as things are moving today.

(continued on next page)

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follows

O'Sullivan-cross/Gillen

EK:jm
T4am

MR. RITCHIE (continuing): There is case law to the effect that reputation evidence by a police officer concerning a person who he is investigating or who took part in an investigation is inadmissible. I think the Court can see the reasons for that.

THE COURT: It certainly would be inadmissible I think if offered in evidence against Mr. Goberman to attack his integrity, credibility, anything of that sort. But so far as the jury is concerned, I think very much worse things about Mr. Goberman have come already from his own mouth than they are going to hear, or which may have been retailed by Mr. Gill to Mr. McNamara. I think the real question is, and you are right, that the jury must be cautioned that Mr.Gill is not here as a witness and was not talking except at second-hand himself and that this was third-hand and therefore is irrelevant except to show what was in the mind of Thomas McNamara at the time in question and where it came from, and not that it was true or should have not been in his mind.

MR. RITCHIE: Yes, I see, your Honor.

MR. GILLEN: I press my offer, sir.

THE COURT: All right.

I overrule the objection.

O'Sullivan-cross/Gillen

MR. GILLEN: Thank you.

THE COURT: Do you want to take your cigarette break now?

MR. GILLEN: Yes.

(At this point, a recess was taken.)

(continued on next page)

HShapiro
T5amR1
follows

HS:jm
T5amR1

(Jury present.)

(The witness returned to the courtroom and resumed the witness stand.)

MR. GILLEN: May I proceed?

THE COURT: Yes.

BY MR. GILLEN:

Q What did you tell Thomas McNamara about Harry Goberman -- do you have the context now?

A Yes, I do.

I told him that I had discussions with Mr. Edward Connors of the County Court Trial Bureau and Mr. Jack Erlich of the Suffolk County District Attorney's Office, Fraud Bureau, and I told him that Mr. Connors had indicated--

MR. RITCHIE: I must object. The question was directed towards Mr. Gill.

THE COURT: Yes, as I understood it.

I am not sure there isn't a slip question here, isn't that right, Mr. Ritchie?

MR. RITCHIE: I am not sure either.

THE COURT: I think that the last question asked was whether he had talked alone to Mr. Gill.

BY MR. GILLEN:

Q That is what I meant by context.

A I am sorry. I definitely misunderstood.

THE COURT: Whether he had told Thomas McNamara about his alone talk with Mr. Gill between June 7 and June 16th.

BY MR. GILLEN:

Q That is correct, that is what I meant by "context?"

A Now I understand the question.

Q What did you tell Thomas McNamara -- what was said by you and what was said by him?

A I was advised by Gill that there was a confidential on-going investigation into a homicide in which Mr. Goberman was considered the principal or the perpetrator.

Q This is what you told Thomas McNamara?

A Yes, I did.

Q Now, did Thomas McNamara ask you any questions about Goberman?

A He asked me if I had any other information about Mr. Goberman.

Q Did he ask you whether he was a dangerous man?

A I don't --

MR. RITCHIE: Objection.

THE COURT: Please do not lead.

MR. GILLEN: I apologize.

Q What other questions did he ask?

A He asked me what I knew about Mr. Goberman and I advised him what I was able to find out from Detective Gill.

THE COURT: What Mr. Gill told you?

THE WITNESS: I advised him what Mr. Gill had told me, correct.

THE COURT: True or false, what he had said to you.

BY MR. GILLEN:

Q I show you Exhibit Z in evidence and do you recognize that check -- look at the date, please?

A Could I look at my files for a second?

Q Surely.

(Pause.)

A The check looks familiar to me.

Yes, I recognize that check, Mr. Gillen.

Q It is a check that is in evidence of thirty-six thousand some odd dollars, dated June 16, 1972?

A Yes, thirty-six thousand, six hundred.

Q Were you present on June 16 when that check was--

A Yes, I transported that check and delivered it to Mr. Sfaelos, Mr. Goberman's attorney.

Q Did that have anything to do with the building on Nesconset Highway?

A Yes, it did.

MR. GILLEN: I have nothing further.

Thank you.

THE COURT: Did you mean that you delivered the check on the day of its date to Mr. Goberman's attorney?

THE WITNESS: Yes, I believe that is correct.

If I could check my notes, I would be able to answer that with more certainty.

Your Honor, my notes indicate that I met with Mr. Sfaelos at the Candlewood Diner on June the 15th, 1972 at about 6:30 to seven o'clock and that I got an agreement from Mr. Sfaelos to hold the check in escrow and I gave him a check for thirty-two thousand, six hundred dollars and I believe this is the same check that Mr. Gillen showed me, so my best recollection would be that I actually delivered that check on June 15, 1972, even though it is dated June the 16th.

MR. GILLEN: I have nothing further.

MR. RITCHIE: Anything further?

MR. LEONE: No questions.

MR. FISCHETTI: No questions.

(continued on next page)

REDIRECT EXAMINATION

BY MR. RITCHIE:

Q Mr. O'Sullivan, that check that was delivered to Harry Goberman, was that a check in payment of a requisition from Harry Goberman to Mr. Thomas McNamara?

A If I may check -- I believe that's correct.

If I may check my notes, I would be able to answer that better, Mr. Ritchie.

I can't find what I am looking for, but I believe that is correct and I believe Mr. Sfaelos signed an agreement to hold that check in escrow.

Q You have already said that, Mr. O'Sullivan.

A I am saying that is my best recollection.

Q Now, on June the 8th, 1972, you met with Mr. Goberman in Len-Al Construction, did you not?

A In the basement of the private residence that I believe was Len-Al Construction's office, yes.

Q And Mr. John McNamara accompanied you?

A Yes.

Q And there was a discussion about the cost of the contract, was there not -- the cost of the relationship of the parties under the contract, was there not?

A There was a discussion that I wished to have Mr. Goberman verify to me personally that he was paying all

the sub-contractors that he was required to pay per each requisition.

Q Did Mr. Goberman state at any time that he wanted to get paid by Mr. McNamara?

A No, he claimed at that time that he was in fact paying the sub-contractors and he indicated to me that the following Friday he would sit down and prove to me that he was paying them by showing me the cancelled checks.

Q And were you shown cancelled checks -- you were shown cancelled checks, were you not?

A Not the following Friday.

Q Were you shown the cancelled checks at any time during the course of your representation?

A Yes, I was, by Mr. Sfaelos in his office.

Q You only represented Mr. Thomas McNamara up until June 16, 1972; is that correct?

A On June 16th I advised him that I was no longer going to represent him, but I did not represent to the other side to give him time to get another attorney to represent him.

Q Was it during the course of your representation of Thomas McNamara that Mr. Sfaelos showed you these checks?

A Yes, definitely.

Q And Mr. Goberman had agreed on June 8th to show you those checks, had he not?

A Yes, he did.

Q It was only when you received a call from Mr. Sfaelos that -- that that date to be shown the checks were put off, right?

A It was pursuant to Mr. Sfaelos' call.

I believe he wouldn't show them to us, but ultimately he did.

Q Mr. Goberman was willing to show them to you right at that meeting on June the 8th?

A That's what he said.

Q And did he have any complaints about the payments by the McNamaras?

A Did Mr. Goberman personally, no.

Q Did Mr. Sfaelos?

A Yes, he did.

Q And it was on June 16th that he did pay a requisition in the amount of thirty-two thousand?

A I believe it was June the 15th.

Q Was that an advance of any kind or any payment due under the contract, pursuant to the contract?

A It was payment pursuant to the contract, but was not due at that time. It was in advance -- it was in advance, in effect.

Q What is the date on the requisition?

A I'd have to check the files.

Q Wasn't it May 15, 1972, a month before?

A Very possible, Mr. Ritchie.

Q You don't recall too well what date?

A I would look it up for you.

Q You don't recall the date?

A I would look it up for you. I will do my best.

(continued on next page)

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A (Continuing) I believe it was the third requisition that was submitted by Mr. Goberman which the check represented.

Q What was the date?

A I don't know if I can answer that, I will try my best.

I have an indication here of a photocopy marked requisition number three dated May 15, 1972, that is the requisition for $32,610.

Q Isn't it a fact that during the course of your negotiations with Mr. Goberman and with Mr. Sfaelos that you did complain about their payments to the subcontractors?

A The basic complaint I had for Mr. Sfaelos was --

Q My question was, isn't it a fact that what complaints you made were put forward as representing Thomas McNamara?

A I don't understand your question, Mr. Ritchie.

THE COURT: Wasn't it the basic complaint of Mr. McNamara and that you put forward on his behalf to Mr. Goberman that Mr. Goberman had not been paying the subcontractors?

THE WITNESS: That was one of several complaints, your Honor.

THE COURT: All right.

Q And Mr. Sfaelos and Mr. Goberman also had complaints about the performance under the contract of Mr. McNamara; did they not?

A Mr. Sfaelos complained to me that Mr. McNamara was trying to act as general contractor on the job.

Q And he was acting as attorney for Harold Goberman at the time, was he not?

A Yes, sir.

Q And you were dealing with him as attorney for Thomas McNamara?

A Yes, I was acting as attorney for Thomas McNamara and he was dealing with me as attorney for Mr. Goberman.

Q Now, you told us in your testimony that at no time on June 8, 1972 did Harry Goberman complain about being beated on June 5th?

A Absolutely correct, that is correct.

Q But were you aware of the fact that Mr. Gill had been informed by Mr. Goberman that he had been beated, were you aware --

MR. GILLEN: Objection, your Honor.

THE COURT: Well, I think the question has been virtually asked and answered by the inclusiveness

of certain earlier questions relating to what was said at several meetings around this date.

MR. GILLEN: Let him ask what was said to Mr. Gill.

THE COURT: Well, yes.

BY MR. RITCHIE:

Q Mr. Gill had been in the office of James McNamara on June 7; is that correct?

A It was in James McNamara's personal residence, it was in an apartment above what is now McAlister Motors.

Q Was it in his personal apartment?

A That is correct.

THE COURT: It was then the downtown office of the McNamara's?

THE WITNESS: I believe, your Honor, they have have one room on the top floor taht they were using for an office, but the business at that point, I am trying to think -- I guess it was still there, maybe it was in McNamara's name at that time, well, it must have been.

Q Would it refresh your recollection if I told you that the show room, the new show room, didn't come into existence until later?

A AS I think back, it was McNamara Buick at that

time.

Q You did meet with James McNamara and the other individuals and Thomas Gill in James McNamara's apartment; is that correct?

A That is correct, yes.

Q Now when you communicated what you had learned from Thomas Gill about Harold Goberman to Mr. McNamara, did he at that point inform you that Mr. Goberman had in fact threatened him?

THE COURT: No.

Did he inform you of anything with respect to Mr. Gill and Mr. Goberman?

MR. RITCHIE: No, my question is --

THE COURT: All right, go ahead.

MR. RITCHIE: I will rephrase it.

THE COURT: Please.

Q At the time that you informed Mr. Thomas McNamara about what you had learned from Thomas Gill concerning Harold Goberman, did Mr. McNamara at that time tell you about any threats of violence?

Did he tell you about any kicking or spitting or assault upon his person or the persons of anybody closely related to him?

A He advised me that he had had some violent

arguments with Mr. Goberman on the job site, but he never told me specifically that he had been threatened, specifically that he had been spat upon or specifically that he had been assaulted.

Q Assaulted is a crime in the New York State Penal Law; isn't it?

A I believe, Mr. Ritchie, if he was threatened that would be a crime, too.

Q Threats would be a crime, would they not?

A I think if there was substance to them, yes.

Q Was there not a complaint about a threat to his person or to the person of anybody closely related to him at that time?

A At that time he advised me that they had had some argument, but to best of my recollection he never told me that he was threatened, at no time did he specifically tell me there was a threat.

Q Isn't there a lot of difference between an argument and a threat in your mind?

A In mind, yes.

Q At no time during the entire course of your relationship with Thomas McNamara did he or anybody closely related him tell you of any threats by Mr. Goberman?

A The first time I ever heard of any threats

was about a day or two --

Q Please answer my question.

A Mr. Ritchie, I am trying my best to answer your question.

Q Okay, fine, go ahead.

A The first time that I heard of any threats specifically was a day or two after I advised Mr. McNamara that I wished to be substituted for his attorney.

Q And what was your reason for wishing to be substituted?

MR. LEONE: Objection, Judge.

THE COURT: Can I hear that question, Mr. Karr?

(Record read.)

THE COURT: Unless it is materially related to the facts in this case, I don't see that it has' any bearing on it.

MR. RITCHIE: Can I have a side bar, your Honor?

THE COURT: Yes.

(Cont'd on next page.)

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(The following occurred at side bar without the hearing of the jury.)

MR. RITCHIE: I have been informed, I belive it was by Mr. McMullen, that the reason Desmond O'Sullivan as counsel terminated his relationship with Thomas McNamara was because of Mr. McNamara's violent anger.

Now I would like to go into this out of the presence of the jury so that if that is not the fact the answer will not prejudice the jury.

THE COURT: Isn't it in the 302?

MR. RITCHIE: It is not included in the 302.

MR. GILLEN: It is not included in the 302.

THE COURT: Just a moment.

MR. GILLEN: I'm sorry, sir.

THE COURT: Did you listen to what Mr. Ritchie said.

MR. GILLEN: Yes.

THE COURT: Mr. Ritchie said he would be very glad to pursue this line of questioning out of the presence of the jury.

MR. GILLEN: Your Honor, I would most respectfully object to any inquiries about Mr. O'Sullivan and Mr. McNamara or as to any reason for the discontinuance of Mr. O'Sullivan's services, and I most

respectfully submit it cannot have a blessed thing to do with the issues of this case.

In addition thereto, I take strong and violent argument with the premise that an FBI agent had been doing things and not making reports. I just don't understand it.

This is a retrial, it isn't the first time they have been here.

It is incomprehensible to me.

MR. RITCHIE: I don't believe it is, your Honor, perhaps it was out of regard for Mr. O'Sullivan's wishes.

MR. MEISELMAN: You mean not to put it in the 302?

MR. RITCHIE: If it had been in the paper I would be 100 percent certain about it but --

THE COURT: I don't think it would show anything except proclivities.

MR. RITCHIE: We have had a lot of testimony about proclivity through representations that were elicited by Mr. Gillen through Mr. O'Sullivan.

MR. GILLEN: I would like your Honor to take judicial notice that we are talking about two Irishmen, Mr. O'Sullivan and Mr. McNamara.

MR. RITCHIE: I ask your Honor to take judicial notice that Mr. Gillen has grave opposition to testimony about the violent proclivities of an Irishman but not about the violent proclivities of a Jew.

MR. LEONE: You are joking.

MR. RITCHIE: Yes, I am joking basically, I have got to say.

THE COURT: No, I think we would just be getting Mr. O'Sullivan's opinion.

MR. RITCHIE: We certainly have got hearsay opinions of other persons already elicited through the testimony of Mr. O'Sullivan on cross.

THE COURT: I don't recall that.

MR. RITCHIE: Well, we have had testimony concerning --

THE COURT: No, I think that you had testimony from Mr. O'Sullivan that Mr. Thomas McNamara said that they had violent arguments.

I think it would be dangerous to go into this area.

MR. RITCHIE: Yes, your Honor.

MR. GILLEN: Thank you.

(The trial then proceeded within the hearing of the jury.)

BY MR. RITCHIE:

Q Now, at the time that you finally did learn about threats, and this was from -- this was not from Thomas McNamara, was it?

A No, that is correct.

Q At the time that you did finally learn about threats -- from whom?

A I'm absolutely certain Jimmy told me and I believe John also told me.

Q You believe that Jimmy did?

A Jimmy definitely did and I think John also did.

Q At the time that you learned about these threats from either one of the two McNamara sons, what if anything did they ask you to do with regard to their communication of threats of violence?

A They didn't ask me to do anything, I wasn't representing them any more.

Q Just basically, what was it that was said?

A That Harry Goberman was threatening -- I was passing by Jimmy McNamara's apartment because I had to pass by to where I live and I was stopped at the red blink light and Jimmy stopped for a second and I asked how things were going and he related to me at that time the fact that Harry apparently had blown his top and was threatening to get

a shotgun and was threatening to blow up the garage.

Q Did he tell you anything else?

A At that time I didn't spend very much time and I said that I hope nothing happens, and he said the guy is a violent guy and not to allow him in my house.

Q Were you at that time told anything about a meeting on June 5th?

A I was never told about any meeting on June 5th.

Q Were you told about the fact that Harry Goberman had gone to Thomas Gill?

A Mr. Ritchie, the first time I have ever heard about that was today from you.

Q You don't know if it was true?

A I have no idea, Mr. Ritchie.

Q Now, during the course of your relationship with Thomas McNamara, you testified that you had a lot of documentation put together; is that correct?

A Requisitions, checks, and I had to read the contract, yes.

Q And it was within the context of the documentation that you were consulted by the McNamaras, was it not?

A Yes, I was.

Q That was in relation to the contract and in relation to the supporting documents?

A I was consulted by the McNamaras because they felt that Mr. Goberman, number one, wasn't paying the sub-contractors, and, number two, he was building and constructing the offices and the showroom in a grossly negligent manner and they felt it was very defectively being constructed.

Q And did Mr. Goberman or Mr. Sfaelos ever deny those complaints?

A Did Mr. Goberman? I really never other than the one conversation on June 8th, I don't believe I spooke with Mr. Goberman. Mr. Sfaelos indicated to me that he felt that Mr. McNamara was giving Goberman a hard time, and I told him I had just the opposite point of view, that what I can point out is that Mr. Goberman was building the building terribly, there was a huge crack in the front wall --

Q Are you an expert on construction?

A No, I'm not an expert but I know a lot about construction.

Q You were in effect and were at that time in effect an adversary, an advocate for a particular party in a dispute, were you not?

A I was Mr. McNamara's lawyer, that is correct.

(Continued next page.)

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T6/R3

Q And whose was the cozy idea of a criminal complaint against Mr. Goberman?

A At what time and in what respect?

Q In connection with your representation of Thomas McNamara.

A Well, when I was advised of the possibility that some of the subcontractors were paying MR. Goberman kickbacks and realizing that these were probably Federally insured funds since they were advanced from the Midland Marine Bank, I thought there was a possible violation of law, yes, sir.

Q And as a result of the interview with Thomas McNamara and as a result of your legal expertise, you then went to the law enforcement authorities?

A Yes.

Q Did Mr. McNamara agree to accompany you?

A Yes, absolutely.

Q And did he ever agree to the complaint?

A Mr. Ehrlich looked into it to see if he felt it was a prosecutorial action.

Q Mr. McNamara was looking to see whether Harry Goberman could be prosecuted for a crime; isn't that right?

A There is no question about that, yes.

Q And it was in the context of prosecuting Mr.

Goberman for a crime that you went to see the Suffolk County District Attorney's Office; is that not correct?

A That is correct.

Q And you are aware of the fact that if there had been a threat that would also have been a crime; are you not?

A Yes, I am.

Q And yet you weren't aware of any threats at the time that you went to the Suffolk County District Attorney?

A No, if I had known that a person had been threatened I would have had a totally different attitude.

Q And Mr. McNamara didn't communicate such to you?

A No, he didn't.

MR. RITCHIE: I have no further questions.

RECROSS-EXAMINATION

BY MR. GILLEN:

Q Mr. O'Sullivan, during this period of time did Mr. McNamara want that building completed?

A Yes, He did.

Q And were there delays in the completion of the building?

A Yes, there were.

Q Did Mr. McNamara have a deadline for new cars in the new showroom?

A It was my understanding that the building was way behind schedule and he wanted to get in there as soon as possible.

Q So as a matter of fact -- I will withdraw that.

So his main purpose was to get that building completed for his business?

MR. RITCHIE: I must object to the leading, this is new material and it is beyond the scope of redirect.

MR. GILLEN: Your Honor, this was from Mr. Ritchie's redirect.

MR. RITCHIE: I believe that mine was --

THE COURT: Well, this is in connection with the objectives of Mr. Thomas McNamara?

MR. GILLEN: Yes.

THE COURT: I think he may inquire.

MR. GILLEN: Thank you.

Q My question is, Mr. O'Sullivan, was it Mr. McNamara's objective to get that building done?

A Very definitely.

Q Was that his main objective?

A That was his -- at that point his only objective

as far as I recall.

Q Thank you.

Now, you told us -- I will withdraw that.

Did you physically inspect that job site?

A Yes, I did.

Q And were there visible defects?

A Very visible defects.

Q What did you see with your own eyes?

A I saw a structural steel member had actually penetrated --

MR. RITCHIE: Your Honor, I must object at his testifying concerning what he considers to be defects in the construction of the building. I don't believe that is for him fitting at all, and I don't believe it relates to any issues in this case.

THE COURT: Yes. I don't think he is qualified at the moment as an expert to testify to these things.

MR. GILLEN: I am only asking what he say with his own eyes, visibly.

THE COURT: Well, you are asking the jury to swear themselves in as expert architects and decide whether they think that that was a defect. I think it would be an opinion testimony on an expert area --

in an expert area.

BY MR. GILLEN:

Q Do you have any experience in construction, Mr. O'Sullivan?

A I have construction experience.

Q Will you relate what it is?

A I was a New York City Fireman for seven and a half years and we would take course after course on construction and buildings.

A part of our duty specifically was to inspect buildings, new construction and old construction, for defective workmanship as to fire hazards.

Q Was that to protect your life as a fireman?

A My life and also the people in the district, yes.

(Cont'd on next page.)

MP:tr T7/R1

Q Did you see any visible defects in this building?

MR. RITCHIE: Objection.

THE COURT: You may answer.

A Yes, I did, Mr. Gillen.

Q Please tell the jury what they were.

A Between the main garage area and the showcase room there was a very large structural steel member pushing the front wall.

There was a huge crack in the cinderblocks and terracota.

Q Would you say this is a dangerous condition?

A Obviously, the wall is in danger of coming down.

Q Were there any other defects?

A MR. McNamara and John McNamara took me to the roof of the building when I returned from Len Al on June 8th. There was an obvious dip on the roof indicating that the roof had sagged creating a drainage problem.

Q Would that create a dangerous condition if water collected on the roof?

A I can't give you a professional answer but I would say yes.

Q And any other defects?

A Some of the concrete was shoddy and falling down and it seemed like a bad job. I couldn't give you an expert opinion on that.

MR. GILLEN: Thank you, no further questions.

REDIRECT EXAMINATION

BY MR. RITCHIE:

Q Is it your testimony that Thomas McNamara's only object was to complete the construction of that building?

A His object, Mr. Ritchie, was to get the building built and get it built correctly.

Q That was his only object?

A As far as I know.

That's what he wanted to do.

Q And so is it your testimony that Mr. Thomas McNamara was willing to swear out a criminal complaint against Harry Goberman to get him off that job?

A He wanted to get him off the job. He never did swear out a criminal complaint although he had the opportunity.

Q It was Mr. Ehrlich's opinion, was it not --

MR. MEISELMAN: Objection, your Honor.

THE COURT: Yes, I think the question in the form asked is objectionable.

Q What did Mr. Ehrlich say at the conclusion of the meeting with respect to the possibility of a violation of the law?

A Within 24 hours he contacted me and he said he felt there were technical violations of law but he felt they did not have sufficient substance for his office to go forward with a prosecution.

He indicated to me if Mr. McNamara personally wanted to prefer a charge he would present it to the Grand Jury.

Q In other words, Mr. Ehrlich didn't think too much of that complaint?

MR. LEONE: Objection, your Honor.

THE COURT: The objection must be sustained.

Q Did Mr. McNamara ever swear out a complaint?

A No, he didn't.

Q If after it was decided that that complaint would be sworn out, were you still representing him at that point?

A At that time, I advised him that I didn't think he should file a complaint. And there was insufficient evidence to do so. I thought he had a technical violation, more in the nature of a commercial fraud at this point.

Q Something for civil litigation?

A That is my opinion.

Q As an attorney it was your opinion?

A In my opinion there was a technical violation of the statute. That was Mr. Ehrlich's opinion, but we didn't feel it was something that he could prosecute successfully because of the burden of proof involved.

Q Because of the burden of proof and the substantiality of the complaint?

MR. LEONE: Who is testifying?

THE COURT: I think he already said what he said.

MR. RITCHIE: Yes, your Honor.

Q After it was decided there would be no criminal complaint filed, was it still Mr. Thomas McNamara's sole object to complete the construction of this building and do it correctly and on a particular schedule?

A Yes, it was.

Q Do you know what he did to further that objective?

A On my advise we attempted to have Mr. Lemanski who was the architect under the contract, we attempted to have him removed and he ultimately did resign.

Subsequent to that, we attempted to substitute Mr. Louis Romeo who is a PE, so was Mr. Lemanski, neither

one were actually architects, but the contract was modified.

An architect was defined as a professional engineer, and there was an attempt to substitute Mr. Romeo as the architect for the project.

Q Was he substituted during the course of your representation of Mr. Thomas McNamara?

A Yes. After Mr. Lemanski resigned we advised Mr. Fallis and Mr. Goberman that Mr. Romeo would take his place on the job.

Q They objected to the replacement?

A Yes, initially they did.

Q Did they object to it June 16, 1972?

A I would have to check my notes to tell you.

Q Would you do that, please?

A My file indicate that a letter I wrote on June 16, 1962 to Mr. Fallis after a telephone conversation with him at 3:30 on the 16th, He advised me that MR. Louis Romeo is no longer an acceptable substitute.

He advised on the 16th he was no longer an acceptable substitute.

At that point I demanded in writing that he set forth the reasonable grounds upon which he was objecting to Mr. Romeo's substitution and as required by the contract, Section 2 Point 2 Point 19 of the general conditions.

He at that point also asked me in the telephone conversation to set forth the background of Mr. Romeo and I indicated in that letter that Mr. Romeo had ADS as a general contractor's general superintendent and he approved 21 million dollars worth of school construction in the Three Villages School District; he approved numerous contracts, a million dollars worth of requisitions and approved 25 million dollars of requisitions as consulting engineer for the new Internal Revenue Service Center in Brookhaven.

Q The question of the architect was resolved by the time you finished representing Thomas McNamara?

A Well, from June 16 to June 29 I received no further reply. On June 29 I indicated in a letter to Mr. McNamara that no reply has been received to my letter of June 16, 1972 in which I demanded that Mr. Goberman state his objection.

Q My question is, and you have not answered it, was that issue resolved on June 16th?

A No, it was not.

Q Yes or no?

A No, it was not.

Q After you removed the architect, would it be the next logical step to get rid of the contractor?

A At that point I felt we wished to avoid any civil litigation. We definitely wanted to remove the contractor.

I wanted to make sure there was no civil liability on Mr. McNamara's part.

Q Did you prepare a contract release for Thomas McNamara?

A From whom to whom?

Q Between parties, Thomas McNamara personally or corporately, and Harry Goberman personally or corporately?

A I don't believe so, I honestly don't recall. All this happened at the time I terminated my service.

Q Were you aware of the fact that there has been a contract release prepared for that purpose?

A No, I was not aware. The first time I heard was when you showed it to me the last time I was here.

Q You testified previously, have you not?

A Yes, I have.

Q Was it ever communicated to you by Thomas McNamara in the course of his representation --

MR. GILLEN: I object. What are we having, re re re redirect?

THE COURT: You are going on and on and on.

MR. RITCHIE: Your Honor, I believe this is

properly redirect toward the last questions by Mr. Gillen. It is only for that reason --

MR. GILLEN: This is the fourth time Mr. Ritchie has been on re, re, re, redirect. I object.

THE COURT: Overruled. Let's move along.

Q Did Mr. McNamara inform you during the course of your representation of him that he was also being represented by J. Timothy O'Shea?

THE COURT: Is it Shea or O'Shea?

MR. RITCHIE: Shea.

A To my personal knowledge, I don't believe Mr. Shea was personally representing him during the specific time I was involved in this.

Q Did he tell you that?

A No, he never told me Mr. Shea was representing him. I believe Mr. Shea was John McNamara's attorney.

Q Did Mr. John McNamara ever tell you that a contract had been prepared with respect to the contract under which you were working?

A No.

MR. RITCHIE: I have no further questions, your Honor.

MR. GILLEN: No questions.

MR. LEONE: Thank you, no questions.

THE WITNESS: May I go, your Honor?

THE COURT: I think there was some --

MR. LEONE: No questions.

MS. SELTZER: No questions.

THE COURT: You are excused, Mr. O'Sullivan.

THE WITNESS: Thank you, your Honor.

(Cont'd on next page.)

MP:jm
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MR. RITCHIE: The Government would call Mr. Allen Goberman as its next witness.

THE COURT: Would you come up here and stop and face me and raise your right hand.

A L L E N G O B E R M A N , called as a witness on behalf of the United States of America, having first been duly sworn by the Court, took the witness stand and testified as follows:

THE COURT: What is your full name?

THE WITNESS: Allen Goberman.

THE COURT: A-l-l-e-n?

THE WITNESS: Yes.

THE COURT: G-o-b-e-r-m-a-n?

THE WITNESS: Yes.

THE COURT: Would you please be seated.

DIRECT EXAMINATION

BY MR. RITCHIE:

Q Mr. Goberman, how old are you?

A Thirty-five.

Q Are you married?

A Yes.

Q Do you have any children?

A Yes.

Q Are you associated with Len-Al Contracting, Inc.?

A Yes.

Allen Goberman-direct

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Q How long have you been so associated?

A Five, six years.

Q Since its formation, is that correct?

A Yes.

Q If you know, how was the name Len-Al Contracting formed?

A It is my name switched around.

Q Are you an officer of that corporation?

A No.

Q Who is the officer?

A My wife.

Q Do you know what title she holds?

A President.

Q And her name is --

A Helen Goberman.

Q Are you related to Harry Goberman?

A Yes.

Q What is your relationship?

A My brother.

Q Is he older or younger than you?

A Older.

Q Approximately how much?

A Seventeen months.

Q Was Harry Goberman ever associated with Len-Al

Contracting?

A He worked for Len-Al Contracting.

Q What did he do for Len-Al?

A He was an estimator, basically.

Q What do you mean by an estimator?

A He would figure the price out for a building. You know, take off from the plan and come up with the total price of what should be asked for the job.

Q Was he associated with Len-Al in that capacity in the year 1971?

A Yes.

Q During the course of that year, did you have occasion to build any other showrooms?

A Yes.

Q Was one of them -- how many?

A We built one.

Q What was the name?

A That's North Shore Lincoln-Mercury.

Q Is that also commonly referred to as Zeidler Motors?

A It is owned by Zeidler Motors.

Q Now, during the course of the year 1971 -- when did Mr. Harold Goberman leave the employ of Len-Al?

A When he started McNamara\Buick.

Q During the course of what year?
A (No response.)
Q Would --
A About two years ago.
Q February to June of 1972?
A Around that area, June, 1972.
Q During the time he was associated with Len-Al, was he an officer of that corporation?
A No.
Q Was he at any time an officer?
A No.
Q Do you know where he was employed after he left the employ of Len-Al?
A When he left the employment of Len-Al, he was, I guess, self-employed. That's when he built this job, or started building this job.
Q Do you know the name of the company?
A I believe HarMac. I am not positive.
Q You learned that from your brother?
A Yes.
Q When he first started that job, were you aware of the fact he was doing that job on his own?
A Not really, no.
Q Were you under the impression he was doing that

for Len-Al?

A The job was being negotiated. I was under the impression it was negotiated for Len-Al.

Q When did you first learn that job was being done?

A When I passed the job site and seen the excavation being done.

Q Did you then talk to your brother about it?

A No.

Q Did Len-Al do any work or rent any equipment in connection with the construction of that McNamara Buick-Pontiac site?

A Rented them a bulldozer. And also the use of carpenters for a while.

Q When you say the use of carpenters, were they paid by yourself or HarMac?

A Paid by Len-Al, but reimbursed.

Q Now, directing your attention to June 5, 1972, did you have occasion on that day to stop by your house during working hours?

A Yes.

Q On that occasion, who did you see?

A Harold, my wife who was sitting there.

Q Did you have any conversation with Harold?

A He asked me to take a ride with him.

Q As a result of that conversation, did you go anywhere with Harold?

A Yes, we took a ride out to the job site.

Q Which job site?

A McNamara Buick, a new building.

Q Where did you go on the job site?

A To the trailer on the job.

Q While you were at the job trailer, what, if anything, happened?

A Well, the phone rang. Harold picked it up and it was from McNamara Buick --

MR. MEISELMAN: Objection, your Honor.

Q You only know that because Harold told you? You don't know that of your own independent knowledge?

A No.

Q After you heard the phone ring, and after you heard your brother talking on the phone, what, if anything, did you then do?

A Then we got into the car and drove over to McNamara Buick, the main office. The whole building.

Q Where is that in relation to the job site, in terms of miles?

A Two or three miles.

Q The job site is located on what road?

A Nesconset by-pass.

Q The old McNamara Buick-Pontiac is located in the town of Port Jefferson?

A Yes.

Q You know your brother very well?

A Well, I knew him well when we were growing up.

(continued on next page)

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S:jm
'8amR1

Q When you are speaking with him -- generally conversing with him, are you able to ascertain his state of mind?

A Whether he looked excited or calm, yes.

Q Now, from speaking with him at your house and from observing him, what manner of manifestation of his state of mind did you observe?

A Well, it struck me at the time that he looked upset and he wanted me to go with him, you know, to keep him company, so I went.

Q He looked upset?

A Right.

Q Did he explain to you what he was upset about?

A No.

Q But observing him, you did accompany him, did you not?

A Yes.

Q Have you ever seen these manifestations of upset in your brother before?

A More or less, but to put a time and place on it, it's hard to say.

Q What do they denote to you --

MR. MEISELMAN: Objection.

THE COURT: What was that?

MR. RITCHIE: What do they denote to you?

THE COURT: Let us move along.

MR. RITCHIE: Yes, your Honor.

BY MR. RITCHIE:

Q Now, after leaving the trailer, you went to McNamara Buick-Pontiac, did you not?

A That's right.

Q Where is that located; in the town of Port Jefferson?

A Well, it is on Main Street at the end of the town, across from the water.

Q Do you know what the other route is?

A Pardon me?

Q Do you know what the other route is?

A Well, Route 112, I think, it turns into Main Street.

Q Is it at the intersection of Route 112 and Main Street?

A I think it is one and the same.

Q Is there a cross-street?

A Well, the end of the town there is a street where Main Street runs into another street, where you have to make a left or a right and that's the end of Main Street.

Q It ends in a "T"?

A Yes.

Q When you arrived at the building, what, if anything, did you then do?

A We walked into the showroom and then it was said, "Let's go upstairs."

Q Who did you walk into the showroom with?

A I walked into the showroom with Harold.

Q Who said "Let's go upstairs?"

A I can't remember now.

Q Did you in fact go upstairs?

A Yes, we went upstairs.

Q When you went upstairs, where did you go?

A We went upstairs into an office.

Q And who was present in the office when you arrived there?

A There was an old fellow who I guess was the bookkeeper and a secretary.

Q And while you were in their presence, was anything said to them?

A They were asked to leave the room.

Q Who asked them to leave the room?

A It is too hard to place anywhere exactly who it was.

Q You testified previously about it, did you not?

A Yes, I did.

MR. GILLEN: I most respectfully object, your Honor.

Sir, if we could have a side bar? This has been going on since the beginning of the trial. I assume Mr. Ritchie prepares his witnesses.

THE COURT: Please, let us move ahead with the questioning, Mr. Ritchie.

BY MR. RITCHIE:

Q Was it asked by your brother Harold?

A No.

Q Was it asked by somebody else?

A Yes.

Q Who, if anyone, was there besides yourself, Harold Goberman, the bookkeeper and the secretary?

A Well, John McNamara, the father --

Q The father is whom?

A John McNamara, Sr.

Q That is how you know him?

A Right.

Q Do you see that individual who you know as John McNamara, Sr. in this courtroom?

MR. GILLEN: Identification conceded.

Q Could you point him out -- could you just

describe him?

A The older gentleman sitting right in the middle of the table there, near the wall.

Q Who if anyone, besides John McNamara, Sr., as you know him?

A Four other people.

Q Do you see any of those individuals present in this courtroom today?

A Yes.

Q Can you point them out?

A One with the brown suit --

Q Could you describe him?

A Brown suit, gold tie, the second gentleman in from the end of the table (indicating).

MR. RITCHIE: Let the record reflect that the witness has identified as being present John DeLiso.

MR. FISCHETTI: May I ask Mr. DeLiso to stand so he can have a positive identification.

(Defendant stands.)

Is this the gentleman that you are referring to?

THE WITNESS: Yes.

MR. FISCHETTI: John DeLiso?

THE WITNESS: Yes.

MR. FISCHETTI: Thank you.

BY MR. RITCHIE:

Q Who, if anyone else?

A The second gentleman here with the brown suit (indicating).

MR. LEONE: Alphonse Merolla, stand up please.

THE WITNESS: And the gentleman sitting behind him.

MR. RITCHIE: Is that the individual you are referring to?

(Defendant stands.)

THE WITNESS: Yes.

MR. RITCHIE: Let the record reflect that the witness also identified as being present Alphonse Merolla --

THE COURT: Alphonse M. Merolla --

MR. RITCHIE: -- and Alphonse M. Merolla.

THE COURT: Agreed?

MS. SELTZER: Yes.

BY MR. RITCHIE:

Q Besides those individuals that you pointed out--

A There was another gentleman that kept me company in the hall, which I don't see today.

MR. RITCHIE: Your Honor, could I have a side bar for a second?

THE COURT: Yes.

(The following took place at the side bar.)

MR. RITCHIE: Your Honor, I would like to have the record reflect that I have previously seen Rocco Merolla present in the courtroom and at this time I do not see him present. He had been here. He had been here earlier this morning.

THE COURT: Mr. Angelo was here before. You say Rocco? You have enough of an identification to be sure?

MR. RITCHIE: I have lived through this case for a long time. I know him. He had been here. I just wanted the record to reflect that he is not here at this time during the course of identification. It is only for purposes of the record that I requested the side bar.

THE COURT: The record has shown that Mr. Angelo Merolla was here in the courtroom. I am not sure if the jury knows that Rocco was here.

MR. FISCHETTI: They do not.

MR. RITCHIE: They don't. I do not want to make a point of it.

THE COURT: There was no testimony.

MR. RITCHIE: Yes, your Honor.

I wanted the record to reflect if he does appear

later on and counsel is not aware that he was present now, they may say, "Why didn't you identify him?"

MR. LEONE: I have a request.

I would request of the Government if there be any additional 3500 material for this witness, Allen Goberman. I request that we be supplied with it this afternoon?

MR. RITCHIE: I do not believe there is. I am making another check.

THE COURT: Not simply the interview by Mr. McMullen, but any other material.

MR. RITCHIE: I have interviewed him --

MR. GILLEN: Ask Mr. McMullen.

MR. RITCHIE: I do not believe so.

MR. LEONE: The answer is you honestly don't believe so?

THE COURT: If Mr. McMullen was present when you interviewed him, would Mr. McMullen have made any notes?

MR. RITCHIE: It depends.

THE COURT: Will you speak to him and make sure?

MR. RITCHIE: Yes, your Honor.

THE COURT: He has to account for his time.

MR. GILLEN: We do not have any 302s.

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MR. RITCHIE: I do not believe so.

MR. GILLEN: You made a search for them?

MR. RITCHIE: Yes.

(The following transpired in open court.)

(continued on next page)

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DIRECT EXAMINATION

BY MR. RITCHIE (cont'd):

Q Now, can you describe the room that you entered?

THE COURT: Can you?

A I will try to.

Q Okay.

A Two plain rooms, an outer room and a room behind a door -- another room, allright, painted green from my memory -- two old rooms.

Q When you say an inner room behind the door, is that your testimony?

A There were two rooms. We had come up into one room and then we walked into another room behind a door that overlooks the street.

Q Was there a door separating the outer room from the inner room?

A Yes, there was.

Q And did you enter the inner room at anytime?

A Yes.

Q Now, the first time -- when you first entered the inner room, did you engage in any conversation with anyone?

A There was a conversation being held about,

you know, money, getting a job, paying bills, you know, to that effect.

Q And did there come a time -- how long were you in the room at that time?

A Five or ten minutes.

Q Did there come a time when you left that room?

A Yes.

Q And what if anything was said before you left the room?

A Well, the conversation was in reference to the job, paying the bills and argument about it, like why didn't you pay the bills and Harold would be saying, "I didn't get the money, so I didn't pay the bills."

Then the argument would be, "You were paid, they should have been paid," and it got into a heated argument and tnat's when I was asked to leave the room with another fellow.

Q Who asked you to leave the room?

A It is hard for me to recall exactly who it was anymore.

Q Was it Harold Goberman?

A No.

Q It was someone in that room other than Harold

Goberman?

A Yes.

Q When you left the room, were you accompanied by anyone?

A I was accompanied by another fellow.

Q And do you see that individual present in this court room today?

A No.

Q Now, during the course of this meeting, did anyone at anytime state that he knew you?

A Vaguely --

MR. MEISELMAN: I did not hear the question. May I have it?

THE COURT: It fooled me, it eneded up in a place different from where I thought it would end.

(Question read.)

THE WITNESS: The fellow that walked out into the hall with me, I believe, stated that he knew me from a job previous -- met him on a job.

Q And how long were you outside this office?

A Ten or 15 minutes, maybe less, but that's the most.

Q And while you were outside, were you able to hear what was going on inside the room?

A Yes.

Q What if anything did you hear?

A Well, what I heard was what sounded to me to be a commotion of a person or persons being shoved around, chairs being knocked around, the slapping around, this is what I recall.

Q Did you hear any conversation?

A Well, what I recall now is that I heard cursing, you know.

Q Do you recall anything else you heard?

A If I think about it I could probably say I recall someone saying "We will kill you" or "I'll kill you."

Q Have you ever testified --

A I believe I testified to that.

MR. MEISELMAN: Objection, your Honor.

Q Who did you hear say "I'll kill you"?

MR. MEISELMAN: I'll object to that.

THE COURT: Yes, he said he might have heard "We will kill you" or "I'll kill you."

THE WITNESS: I'd be guessing if I said John McNamara Senior, because It has been so long ago -- it's over two years.

I can't actually pin a person behind the conversation.

MR. MIESELMAN: Move to strike that testimony,

your honor.

THE COURT: It is stricken.

Q You do not recall at this time who said what?

A No, not really.

Q Had you testified previously in this case?

A Yes.

MR. LEONE: How many times must we object to this?

MR. RITCHIE: I am attempting to refresh his recollection.

THE COURT: You may.

Q I show you now testimony from January 15, 1972

-- THE COURT: No sir, not 1972.

MR. RITCHIE: I am sorry, 1974.

THE COURT: That makes a difference.

MR. RITCHIE: Yes, sir.

THE COURT: January 15, 1974 of this year.

MR. RITCHIE: Yes, your Honor.

Q I direct your attention to page 1242, lines 20 through 25.

(Transcript given to witness.)

THE COURT: Have you read that to yourself?

THE WITNESS: Yes.

THE COURT: All right, Mr. Ritchie.

Q Does that refresh your recollection as to who said what?

MR. MEISELMAN: Does it refresh his recollection as to the fact that he said it or does it -- does he actually remember it?

THE COURT: Yes, that is the relevant thing.

Q Does that refresh your recollection as to who said what on June the 5th, 1972?

A Well --

THE COURT: What he is asking you is:

Now stimulated by that reading, can you genuinely have a live recollection such that you can testify under oath to the jury here as to what you heard when you were outside of what was going on or what was being said inside the room?

THE WITNESS: With the reading here, it refreshes my memory.

THE COURT: Genuinely refreshes your recollection?

THE WITNESS: If I didn't look at this I wouldn't be able to put the words on to who.

Q After reading this, are you able to have a present recollection of who said what when you were outside in the hall?

A Yes.

Q What if any conversation doyou recall hearing

in the hall concerning killing --

MR. GILLEN: Now the witness is reading his testimony.

THE COURT: Please, if you have a live recollection close the book and testify from your recollection as to what you heard and what if anything further you can say.

THE WITNESS: Well, I recollect someone yelling out "I'll kill you."

Q And who was that someone?

A Thomas McNamara --

MR. LEONE: Thomas McNamara?

Q When you say "Thomas McNamara" are you referring to the individual that you referred to as John McNamara Sr.?

A Yes.

Q And you recall that now, is that correct?

MR. LEONE: May the record indicate that the witness shook his head from side to side and that was the response to Mr. Ritchie's question.

THE COURT: Which way did he shake his head?

MR. LEONE: This way (indicating) Judge.

THE WITNESS: It is very hard for me to remember -- remember actually to place whose words

came from whose mouth now two years later.

MR. MEISELMAN: Move to strike his previous testimony in that regard, your Honor.

THE COURT: Well, I wonder the value of it.

I think if it is left this way with the jury, with all what the witness said and all they have seen here, they will themselves be better able to evaluate than if they attempted to exclude what they heard from their recollection.

MR. MEISELMAN: Yes, your Honor.

BY MR. RITCHIE:

Q Now, did there come a time that you re-entered that room?

A Yes.

Q And you re-entered that room with the same individuals present?

A Yes.

Q Now, where was Harold Goberman in that room?

A He was sitting in a chair.

Q And where were the other individuals in the room?

A Well, it is very hard to say again which one was standing in what place, but the three fellows -- the heavy set fellow was in one corner, the fellow behind was

either behind the chair where Charles was sitting or in front of him or opposite -- the gentleman sitting over there -- he was either in the one standing behind him or the one in front of him.

Q There were three individuals gathered around?

A Plus there was the McNamara's in the room.

Q There were three individuals gathered around Harold Goberman sitting in a chair?

A Harold was sitting, one was standing behind him and one was in front of him, and one was standing in the corner and the other two were in the room.

Q Were there two individuals flanking Harold Goberman?

A Yes.

Q Which were those two individuals, if you see them in the court room?

A The second gentleman (indicating).

MR. FISCHETTI: May we have his name?

That is John De Liso.

THE WITNESS: John De Liso, and the gentleman sitting behind Nicky --

MR. LEONE: Who?

THE COURT: I think he means Alphonse M. Merolla.

He had referred to Mr. Alphonse Merolla by

some nickname, but I did not quite catch it.

MR. LEONE: Did I hear "Nicky"?

THE WITNESS: That's what I heard mentioned yesterday, that was his name.

MR. LEONE: Yesterday?

THE WITNESS: Yes.

I didn't know no names. I didn't put no names on nobody.

I didn't follow through with names.

THE COURT: Is this a convenient place to stop?

MR. RITCHIE: I believe so.

MR. LEONE: Yes.

THE COURT: We will have a recess now until 2 O'clock. Please do not discuss the case with one another or anyone not on the jury until it is given to you to decide.

I have no idea whether it is still raining or not.

(Luncheon recess taken.)

(Cont'd on next page.)

AFTERNOON SESSION

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(The jury took its place in the jury box.)

ALLEN GOBERMAN, called as a witness, having been previously duly sworn, resumed the witness stand and testified further as follows:

DIRECT EXAMINATION

BY MR. RITCHIE (continued):

Q Now, Mr. Goberman, just before the luncheon recess I asked you a question about reading a transcript to refresh your recollection; is that correct?

A That is right.

Q And at that time you shook your head; isn't that correct?

A That's correct.

Q What did you mean when you shook your head?

A After reading it -- I read it --

Q You shook your head "No."

A Well --

Q Do you have a present recollection of who said what or are you still uncertain?

A I recollect now Thomas McNamara saying, "I'll kill you."

Q And that is a present recollection?

A That is a present recollection.

Q That is after reading your prior testimony?

A That is after reading my prior testimony.

Q Other than that, you don't recall?

A Well, when I read it and think about it, it came back to me.

Q Now, did there come a time when you re-entered the room?

A Where this incident took place?

Q Yes.

A Yes.

Q And at that time,you previously testified, you remember your brother was sitting in a chair; is that correct?

A That is right.

Q And who were the individuals who were flanking him?

A The two gentlemen I started to identify before lunch.

Q And can you identify them now, please?

A The second fellow --

MR. FISCHETTI: Again, may we have names?

This is John DeLiso.

THE WITNESS: John DeLiso.

And the third fellow in. What is his name --

THE COURT: Mr. Alphonse M. Merolla.

Is that whom you mean? Would you stand?

THE WITNESS: And the other gentleman was him.

(Mr. Alphonse M. Merolla then stood in the courtroom.)

THE COURT: Is this the gentleman you mean?

THE WITNESS: Yes.

BY MR. RITCHIE:

Q Now, did you observe your brother when he was sitting in the chair as you re-entered the room?

A That is right, I did.

Q And can you describe what he looked like at that time, facially and physically?

A He -- well, he was just shook up looking, his face was red, you know, excited looking or nervous, very nervous looking.

Q You stated that his face was red; is that correct?

A That is right.

Q What did that appear to you to have resulted from?

A Well, I thought that it was from being slapped.

MR. MEISELMAN: Objection.

THE COURT: Can you describe what kind of red it was?

THE WITNESS: It appeared as if someone -- as

if he was slapped.

BY MR. RITCHIE:

Q And what, if anything, was he doing?

A Well, he was just sitting there smoking a cigarette.

Q At the time that you entered that room, did you see any weapons?

A When I entered the room I seen a pistol being handed between these two fellows that I just identified.

Q And what, if anything --

MR. FISCHETTI: May I have an identification, please?

Q You are now referring to the two individuals you just identified?

A That is right.

Q The two individuals who were flanking your brother?

A Right.

Q That is Alphonse M. Merolla and John DeLiso?

A Right.

Q And after the second individual received the gun, what, if anything, did he do with the gun?

A It went into a holster.

Q Which of the two individuals placed it in this

holster?

A I believe the third gentleman in, it went into his holster.

Q Is that your best recollection at the present time?

A That is the best recollection.

MR. RITCHIE: Your Honor, may I have a side bar, please?

MR. FISCHETTI: Who is that third gentleman --

BY MR. RITCHIE:

Q Are you referring to Alphonse M. Merolla?

A Yes, yes, I am.

MR. RITCHIE: Your Honor, may I have a side bar?

(The following occurred at side bar without the hearing of the jury.)

MR. RITCHIE: Your Honor, I would like to note that I am truly surprised that this witness' testimony is not consistent with what he previously testified and it wasn't expected by me.

Now, I would ask permission to lead at this point and to impeach him with respect to his prior testimony.

MR. LEONE: What?

MR. FISCHETTI: In what regard, may I ask you, Mr. Ritchie?

MR. RITCHIE: As to his identification of Alphonse M. Merolla as being the person who placed the gun in the holster.

MR. FISCHETTI: It is his witness and his testimony.

THE COURT: The relief which you ask for is relief when there is substantial reason to believe that a witness has changed his testimonial resolve, if I can call it that, in such a manner as to suggest that he means to falsify his testimony perhaps in the interest of some other party or because he has been paid or for whatever reason. But in the absence of an indication that the witness is doing his best to recall, I think that you are pretty much confined to trying to refresh his recollection with everything that flows from it in the way of weakening his testimony.

MR. RITCHIE: OK.

MR. FISCHETTI: Your Honor, I would most respectfully say that I object to any refreshing of this witness' memory unless he is in doubt.

MR. LEONE: That is right.

MR. FISCHETTI: That is the only way it can be refreshed.

MR. RITCHIE: He said, "I believe," your Honor.

THE COURT: Yes.

MR. FISCHETTI: That doesn't indicate a doubt in his mind that Alphonse M. Merolla was the person.

THE COURT: I think the hesitation with which he gave the answer, and if I can call it that, the qualified tone of his voice indicating uncertainty and presumably uncertainty of recollection should be considered.

Now, could you quickly locate the words.

(At this point, the reporter read as follows from the testimony:

"Question: Which of the two individuals placed it in this holster?

"Answer: I believe the third gentleman in, it went into his holster.

"Question: Is that your best recollection at the present time?

"Answer: That is the best recollection.")

MR. FISCHETTI: Then I asked him, if your Honor please, if your Honor may recall, that he identify the individual by name just for this purpose and he identified Alphonse M. Merolla.

THE COURT: As being the person being indicated

by this present testimony.

MR. FISCHETTI: Your Honor, this puts us to a disadvantage because what Mr. Ritchie is attempting to do is to have this witness --

THE COURT: Would you repeat that?

MR. FISCHETTI: It puts us at a disadvantage because what Mr. Ritchie is attempting to do is to have this witness testify in the same manner and same fashion as he did on the original trial.

I know that a witness' recollection can be refreshed when he is in doubt, but here there is a continual attempt to show in prior testimony when he feels inconsistencies have been given in the testimony in this trial, and that I believe he is not allowed to do, sir.

MR. GILLEN: As he demonstrated yesterday in picking out the other witness.

MR. FISCHETTI: That is right.

THE COURT: Well, in the first place, I can't go along with your suggestion that you be allowed to treat him as a hostile witness who has in effect changed sides --

MR. RITCHIE: Yes, your Honor.

THE COURT: And I say that in light of the

Paulsen and the case we had years ago, the famous one of Chief Judge Mishler which gave rise to this whole fuss.

MR. RITCHIE: Michaelson?

THE COURT: No.

MR. LEONE: I don't recall the one.

THE COURT: The one which gave Judge Friendly the opportunity to say that you could read someone's testimony from the previous occasion not just to impeach. I mean this isn't that kind of thing, I think it is just a failure of recollection.

Now, what they are in effect saying is that to allow him to refresh his recollection from his previous sworn testimony is to deny them the right to show that he testified under oath inconsistently on an earlier occasion or unless you deprive them of the chance to show that this testimony should be eliminated from the record, that is if the jury wishes to do it.

MR. FISCHETTI: And it is critical testimony.

THE COURT: I think they are right about that.

I am not sure I agree with these rules, having been a witness myself and knowing what can happen to you under the nervous tension of being a witness. I think it is all pretty rigid and artificial, but I do

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think that is the way it is thought about and I will have to go along with it.

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MR. FISCHETTI: Judge, I am sorry to lay this at the side bar but there are two matters that are important and I want to bring them on.

The fisst is that in Mr. Allan Goberman's Grand Jury testimony on being examined by Mr. Ritchie he named someone who is instructed to stand outside the door, and then in his next lines he identifies in the testimony a picture of that individual who was standing outside the door with him.

Now nowhere in the Grand Jury does he mention the name of the individual, only identifying that picture, and I would ask --

THE COURT: Was the picture a Grand Jury Exhibit?

MR. FISCHETTI: It doesn't say that, and I know who the picture was of.

THE COURT: How do you know?

MR. RISCHETTI: Because of the 3500 material which says that John DeLiso was instructed to step outside the door.

THE COURT: I think he testified at the last trial that it was John DeLiso.

MR. FISCHETTI: Yes, he did, but then he --

MR. LEONE: At the last trial he testified

that it was Rocco, my client in the last trial, who stood outside the door with him.

THE COURT: And now?

MR. LEONE: And now he is telling us it was John DeLiso.

THE COURT: No, no.

MR. FISCHETTI: No, no, sir.

Let me bring the proper --

MR. LEONE: I am sorry.

THE COURT: Now he has said who?

MR. LEONE: Rocco.

MR. FISCHETTI: In the 3o2 he identifies a picture of John DeLiso, Allan Goberman identified him. He said that John DeLiso was instructed to stand outside the door with him, now he said Rocco.

MR. RITCHIE: I believe we went through all of that at the last trial.

THE COURT: What is that?

MR. RITCHIE: I believe we went through all of this at the last trial, there was this question at the last trial.

MR. FISCHETTI: I am not making any offer of proof, all I am saying is that in the Grand Jury testimony he is invited to identify the picture by

Mr. Ritchie, and all I want to know from the Government is what picture he identified, I want to see the picture.

MR. RITCHIE: The photograph has been supplied to you already.

MR. FISCHETTI: Is it John DeLiso?

MR. RITCHIE: It is a Government Exhibit for identification at hitting number 1, it is in that spread.

MR. FISCHETTI: Whose picture is it?

MR. RITCHIE: I would have to assume that it was John De Liso from this 302.

MR. FISCHETTI: John De Liso, all right.

THE COURT: In other words he can't swear to it but he sees no escape from it.

MR. RITCHIE: That is correct, your Honor, that is about it.

THE COURT: You mean he is really on sea of inference with you and draws the same inference?

MR. RITCHIE: That is the only inference that I can see, your Honor.

MR. FISCHETTI: All right.

Judge, finally then, are there are any other reports or interviews of Mr. Goberman between the

last trial and this trial?

MR. RITCHIE: I have spoken with Mr. McMullen he stated there were no further 302s. I have spoken with Mr. Allan Goberman on approximately three occasions, and I did not memorialize any of those conversations.

MR. FISCHETTI: Are there any interviews with Mr. McMullen and Mr. Goberman?

MR. RITCHIE: I believe that Mr. McMullen -- yes, yes, Mr. McMullen was present prepatory to trial but I don't believe that he prepared a 302 from that.

He stated that he hasn't prepared any 302s, and that was approximately two weeks ago.

MR. FISCHETTI: Is that a long interview?

MR. RITCHIE: It wasn't too long an interview with him, it was primarily a long interview with his wife Helen who is rather talkative, to say the least.

THE COURT: She is a handful?

MR. RITCHIE: She is a handful.

MR. FISCHETTI: There are no notes to that?

MR. RITCHIE: I don't know if there are any notes about Helen Goberman.

MR. FISCHETTI: I mean with Allan.

MR. RITCHIE: No.

THE COURT: Okay.

(The trial then proceded within the hearing of the jury.)

THE COURT: All right, Mr. Ritchie.

DIRECT EXAMINATION

BY MR. RITCHIE (cont'd):

Q Now, on the second occasion that you entered the room, on that occasion did you stay in the room?

A On the second occasion is when they came out -- well, --

THE COURT: No, when you went into the room from the hall.

THE WITNESS: Then we left the room, right, then the second time is when the door opened and the gun was being passed back from one to the other.

Q Did you then enter the room at that time?

A We stayed in the outside office.

THE COURT: That is not the same room in which your brother was?

THE WITNESS: But we went into the room for a moment but the conversation sort of moved into the outside office, that is where the registration signing took place.

Q So you did go into the inner room the second time; is that correct?

A That is correct.

Q And how long were you in that inner room before you went into the outer room?

A A few minutes.

Q While you were in that inner room, did you overhear any conversation?

A Well, there was talk about signing over the registration.

Q And who was speaking concerning that?

A Tom McNamara and John McNamara.

Q Can you tell the ladies and gentlemen of the jury what conversation transpired relating to this registration as to the trailer between Tom McNamara and John McNamara and anybody else?

A "Get him to sign this registration, have him sign the registration over for the trailer."

Q Who said that to him?

A I believe Tom McNamara said it to John McNamara.

Q And was John McNamara told to get anything?

A To get a blank registration.

Q And after that was said, was anything else

said, if you recall?

A Well, at that point something was said, "I am not" -- Harold, Harold said, "I am not signing the blank registration."

Then it was said to John, "Fill it out." Tom McNamara said to John, "Fill it out and fill it out right because it can't wrong."

Then it came back into the room filled out and Harold signed it.

Q And was there any discussion with respect to that registration as to what vehcile was to be transferred?

A A trailer, a construction trailer.

Q During the course of this, did you -- how did that registration get into this room?

A I believe Mohn McNamara brought it in.

Q Did anybody else come into the room at the time that this registration went into the room?

A I can't remember.

Q Did you testify previously concerning this?

A Yes, I did.

MR. MEISELMAN: Your Honor, I am going to object to this.

THE COURT: I am sorry, what?

MR. MEISELMAN: The witness says, "I can't

remember," and again Mr. Ritchie is going to let him see something.

MR. RITCHIE: I am going to show him his prior testimony with respect to refreshing his recollection, your Honor.

It is for the purpose of refreshing his recollection, he stated he couldn't remember.

THE COURT: What was the question?

(Question read as follows:

"Question: Did you testify previously" --

THE COURT: No, go back to the question.

(Question read as follows:

"Question: Did anybody else come into the room at the time that this registration went into the room?

"Answer: I can't remember."

THE COURT: Yes, he may have his recollection refreshed.

(Cont'd on next page.)

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DIRECT EXAMINATION

BY MR. RITCHIE: (Cont.)

Q I show you your prior testimony dated January 15th at page 1247 with reference to lines 15 and 16.

(The witness then examined the testimony.)

Q Does that refresh your recollection as to whether anyone else came in?

A Yes.

Q Who if anyone else came in at that time?

MR. MEISELMAN: Your Honor, please, may we have a side bar.

(At this point a side bar conference was held.)

MR. MEISELMAN: Your Honor, Mr. Ritchie referred this witness to page 1247, lines 15 and 16, and in his previous testimony the witness said he was not sure.

May I show your Honor lines 15 and 16.

(At this point his Honor,Judge Dooling, perused the transcript.)

MR. RITCHIE: Now, your Honor, that could refresh his recollection as to the presence of the secretary, that was part of it, the question was directed to the secretary.

MR. MEISELMAN: But he wasn't sure.

THE COURT: Well, no, it wasn't quite that.

I think the question is whether anyone came in, and I believe we have already had this testimony, so what are we talking about.

MR. MEISELMAN: Except that his memory cannot be refreshed with this or with anything else.

THE COURT: If it is not refreshed, it is not refreshed.

(The trial then proceeded within the hearing of the jury.)

BY MR. RITCHIE:

Q Does that refresh your recollection about anybody else?

A Yes, the secretary brought in the registration.

Q And after the registration was brought in, what if anything was done with the registration?

A Well, Harold signed it.

Q After you reentered the room, was there any discussion concerning your brother's bank account?

A It was said something like, "Let's get him to sign a check now, let's get the rest of the money out of the account."

Q Now, if you recall, who said that?

A I can't be certain.

Q Was it your brother?

MR. MEISELMAN: Objection, your Honor.

THE COURT: Overruled.

A No.

Q Was it somebody else in that room?

A Yes.

Q And those words were said and what if anything els was said about the bank account?

A That is about the time that we had left the room and went downstairs, they were going to go to the bank.

Q Who is "we," please?

A Well, myself, the fellow who was in the hall with me, the Merollas, Harold -- I believe it was four people that went to the bank. They went in Harold's car.

Q Do you recall exactly who the four were?

A No.

Q At any rate, did you leave that room with four individuals?

A Yes.

Q There were four individuals other than your brother and yourself; is that correct?

A That is right.

Q And where did you go after you left the room?

A We walked downstairs towards the car which was parked across the street, and they asked Harry where the check

book was, and he said it is in the trunk of the car, and he went to get it and they said, "No, give us the key, we will get it."

They took it out of the trunk and got into the car and went to the bank.

Q Doyou recall where Thomas McNamara was when you left the room?

A Where he was, no. Upstairs.

Q Did he accompany you?

A I can't be sure.

Q Let us retrace our steps for a moment to back in the room now:

Besides the conversation about the bank account and the conversation about the trailer, was there any conversation concerning your brother's car?

A It was also mentioned --

MR. MEISELMAN: May we have, sir, who mentioned what.

MR. RITCHIE: I'm going to try to elicit that.

Q Mr. Goberman --

MR. GILLEN: Objection to the leading, your Honor.

MR. RITCHIE: May I just --

THE COURT: Do not inform him what he is to say

but the topic to which he is to be addressed.

Q Mr. Goberman, instead of saying, "It was said," as best you can, would you identify the individual who said what, what was said to him and by whom?

A I don't recall at the time who said it --

MR. MEISELMAN: Objection.

A (Continuing.) But they said, "Get him to sign over the registration" --

MR. MEISELMAN: Objection, your Honor.

A (Continuing.) "for the Cadillac at the same time."

And I said, "You can't do that because it belongs to Len-Al Contracting" --

THE COURT: Excuse me.

When counsel objects, you stop talking.

MR. MEISELMAN: Your Honor, I object since the person cannot be identified as to who said what.

THE COURT: He may use the passive voice if he cannot recall it but if he does recall what was said then he may testify as to that.

BY MR. RITCHIE:

Q What was said about the Cadillac?

A To get Harold to sign over the registration for the Cadillac that he is driving while he signs over the

registration for the trailer, to get him to sign over the Cadillac, and I chuckled as I recall and I said, "You can't do that, it belongs to the company, the Len-Al Contractors," and that was the end of that.

Q Now, after you got down to your brother's car, who entered that car?

A I believe it was Harold, John McNamara and the two Merollas.

Q Did they get into the car?

A Yes.

Q Prior to getting into the car --

MR. LEONE: Excuse me --

Q (Continuing.) -- was any search made of the car?

MR. LEONE: Excuse me.

THE COURT: Yes, sir.

MR. LEONE: I would ask for some clarification, I understood him to say two Merollas.

THE COURT: Yes, he did.

MR. LEONE: And there are --

THE COURT: Well, I know.

Can you say who entered the car other than the two Merollas.

THE WITNESS: The first gentleman -- the second gentleman over there, I forget his name, and

Angelo.

MR. FISCHETTI: John DeLiso and Angelo Merolla.

MR. LEONE: That is the Merollas?

BY MR. RITCHIE:

Q You just used the words "Angelo Merolla," can you point to the individual whom you meant?

A The third fellow sitting there (indicating).

MR. RITCHIE: Will the record reflect that the witness is pointing to the defendant Alphonse M. Merolla.

THE COURT: Yes.

BY MR. RITCHIE:

Q Now, prior to the car driving off, was the car searched?

A No, the trunk was opened, you know, to get the checkbook.

Q And who opened the trunk?

A Well, Harold didn't, I can't be certain who opened it.

Q Was there any discussion preceding the opening of the trunk?

A Harold went to open --

Q Who opened the trunk?

A Harold went to open the trunk and someone said,

"No, you don't open it, let me do it," in those words, to that effect.

Q Did you drive off in that car?

A No.

Q What if anything did you do?

A I sat on the fence with the fellow that was standing in the hallway with me until he returned, the fence was where the car was parked.

Q Is the individual who stood in the hallway with you present in this Courtroom today?

(The witness then looked around the Courtroom.)

A No.

Q Now, subsequent to these events, did you ever have occasion to have any conversation with the detective, Thomas Gill, concerning this event?

A Yes.

Q And on how many occasions did you speak with Detective Gill about that?

A I believe it was twice.

MP (Continued on next page.)

A. Goberman-direct

Q During the course of these conversations did the topic of the gun come up?

A Yes.

Q During the course of those conversations with Detective Gill, did you admit the presence of the gun or deny it?

A Once I denied the presence of the gun.

Q Was that on the first occasion you spoke to Detective Gill or was that the second occasion you spoke to Detective Gill?

A I believe the second occasion.

Q Would you please tell us where you had these two conversations?

A One conversation was held in my office in the presence of my wife. At that time, I told Tom Gill that I didn't see no gun because I didn't want to get my wife upset.

The second meeting, outside the Mt. Sinai Fire House, I said to him at that time I believed there was a gun passed from one to the other. That's what I seen.

Q You say you didn't want to get your wife upset, does your wife -- what is your wife's feeling concerning your brother Harold?

MR. FISCHETTI: Objection.

A. Goberman-direct

THE COURT: No, he may not answer a question in that form.

Q Could you explain what did you mean by the statement you didn't wish to upset your wife?

A Well, at the time it was just at the time my brother took the job in his own name and left us thinking we were doing the job. We figured we got stuck, screwed. My wife didn't have any love for him after that. Why should I stick up and defend him anyway.

Q That's why you denied the presence of the gun to Detective Gill?

A Yes.

Q On the other occasion, where was this other occasion, where did this other conversation --

THE COURT: You told us about outside Mt. Sinai Hospital --

THE WITNESS: Fire Department.

Q At that time, what did you say and what did Detective Gill say?

A We were standing outside the fire house waiting to hand in a bid and Tom Gill had passed by and pulled over and came over to talk to us.

At that time, he said --

MR. LEONE: Objection to what he said. It's

hearsay obviously.

THE COURT: Well, no, I think it is not offered for the hearsay purpose, the question before Mr. Goberman, did he say something to Mr. Gill on certain occasions, that has not been objected to. Now, he is simply being asked what was said, not whether it was true. He already testified with respect to the episode itself. This is offered to the jury solely to know what he says he now swears he said to Mr. Gill on two occasions before the occurrence upstairs over the showroom.

Q What did you say and what did he say on that occasion?

A We were outside the Mt. Sinai Fire House again and Tom Gill had asked me, "Did you see this gun?" That's what I recall. "Did you see this gun?" I said, "Whatever Harry said to you during the day -- " I imagine he called him during the day and told him about the incident. "Whatever Harry told you what happened is true."

I figured at that time he might have said to me something like what do you think. I shrugged my shoulders like what else is new, Harry is always having little problems. I shrugged it off.

Q You --

A. Goberman-direct

A Yes, I believe Tom Gill did also. He did say something about he went to him and questioned McNamara about it. That's where the statement came in: Any gun around here will be mine.

MR. RITCHIE: I have no further questions.

CROSS-EXAMINATION

BY MR. MEISELMAN:

Q Mr. Goberman, at the time that you were in the room and you heard what was being discussed I believe you testified there was discussion -- am I putting it fairly -- about getting the job moving, getting the job going, about payments to subcontractors, and about kickbacks by Harold from the subcontractors, am I right?

A Right.

Q During the course of that discussion, was any particular subcontractor mentioned?

A No, not really, but there was a phone call placed to a plumbing contractor I was asked to talk to.

Q Did you talk to the plumbing contractor?

A Yes.

Q At the same time that you talked to the plumbing contractor did anybody else in the room talk to the plumbing contractor?

A John McNamara talked to the plumbing contractor.

A. Goberman-cross/Meiselman

Q Did anybody in the room ask your brother to talk to the plumbing contractor?

A I can't remember that.

Q It was a question whether that contractor had been paid or not, is that right?

A Yes.

Q Isn't it a question of your brother saying he was paid and the plumbing contractor saying he wasn't paid?

A I can't be sure about that. My conversation with the plumbing contractor was merely, you know, I walked in and -- I came in from the cold and got on the phone listening to the complaint.

Q Did you discuss with the plumbing contractor -- withdrawn.

Did the plumber tell you unless he got paid he wasn't going to proceed?

A Yes.

Q It was a question of whether he was paid or not, right?

A (No response.)

Q Before he would come back to the job?

A I can't really be sure. I walked in on the conversation.

Q The plumber told you he had not been paid?

A. Goberman-cross/Meiselman

A He wouldn't come back --

Q Did you or anybody in the room ask your brother whether the plumber had been paid?

A I can't recall.

Q Did your brother at that time call Mr. McNamara or any of the McNamaras a liar?

A I believe so.

Q Did your brother at approximately that time throw a punch at Thomas McNamara?

A He threw a punch after Thomas McNamara went to kick him.

Q There was discussion about payment and there was an altercation between Thomas McNamara who you say went to kick him and your brother threw a punch at Thomas McNamara?

A That's right. That is the time my brother was pushed down in the chair and said get these guys, take me out of the room. We will discuss things from here on.

Q Now, have you ever testified to this before here or any place else?

MR. RITCHIE: I must object.

A Probably not in those words.

MR. MEISELMAN: Withdrawn.

Q To the best of your recollection who pushed Mr. Goberman down in the chair?

A I can't say for sure.

Q Was he pushed in the chair to get him away from Thomas McNamara?

A Well, I can't really say that, no.

Q But it might have been?

MR. RITCHIE: Objection, your Honor. It calls for pure hypothesis on the part of the witness.

THE COURT: Yes, the question is improper in form.

Q Well, at that point, Mr. Goberman, didn't Mr. McNamara, Thomas McNamara leave the room?

A I recall his son John calming him down.

Q Did he leave the room?

A I don't recall.

Q As a matter of fact, Mr. Goberman, didn't you take him out of the room?

A I don't recall that.

Q In other words, it didn't happen or you don't remember whether it happened?

A I don't recall taking Thomas McNamara out of the room at all.

Q As a matter of fact, weren't you outside the room with Thomas McNamara?

MR. RITCHIE: I must object to leading at this

point.

MR. MEISELMAN: This is cross-examination, your Honor.

THE COURT: He may lead, of course.

Q As a matter of fact, weren't you outside the room with Thomas McNamara?

A When I left the room at that point I was out in the hall with this other fellow who is not present in the room now.

Q Wasn't Thomas McNamara with you?

A He wasn't standing in the hall with me.

Q Was he in the outside room?

A I am not sure.

Q A little while ago you were asked who brought in the registration?

A That's right.

Q You said you didn't remember, is that right?

A That's right.

Q Then Mr. Ritchie called your attention to page 1247 lines 15 and 16 and you read it and you said it refreshed your recollection, am I right?

A Yes.

Q Were you asked this question and did you give this answer that refreshed your recollection: "Question:

Whom did he say this to?

"Answer: I am not sure. It might have been to a secretary at that point, someone who was in the outside hall."

Is that the question and answer that refreshed your recollection?

A That is correct.

Q Even when you gave that answer to that question you weren't sure, were you?

MR. RITCHIE: Objection. Well, withdrawn.

A I am not sure. That was said in January.

Q You weren't sure in January but today it refreshed your recollection so you are sure, is that right?

A No.

Q Today you are not sure either?

A I am going by what I read there. If I said it then, what I said must be what I recollected at that time.

Q At the time you were not sure, it might have been a secretary?

A Whatever it says there.

Q I see.

Now, when the job was started, Mr. Goberman, you assumed, did you not, that the job was being done in the name of Len-Al?

A. Goberman-cross/Meiselman

A No. Not exactly in that respect. When it was being negotiated I assumed it was being done by Len-Al. When the job was started I knew right away it wasn't done by Len-Al because I didn't sign no contract.

Q On January 15, 1974, while you were under oath were you asked this question and did you give this answer:

"Question: Did he use your office for that purpose?

"Answer: Well, he used our office at the time he was still working for Len-Al. We assumed he was working for Len-Al when he had started doing the job."

Were you asked that question and did you give that answer?

A Yes.

Q Now, Len-Al you say did the land clearing and bulldozing?

A Land clearing.

Q Anything else?

A No. Len-Al loaned Harold carpenters that were working for Len-Al at the time.

Q Anything else?

A That's all I remember.

Q Didn't you buy material for this job in the name of Len-Al and pay for it in Len-Al --

A That's hard to say. Whatever it is on the record. I don't recall.

Q Wasn't Gary Taibbi your employee?

A No.

Q Do you keep a payroll book?

A Sure. Yes.

MR. MEISELMAN: May I have this marked, please?

THE CLERK: Defendant McNamara's Exhibit AS for identification.

(So marked for identification.)

Q Mr. Goberman, I show you Defendant McNamara's Exhibit AS for identification and ask you whether it is a copy of your payroll for the week ending June 7, 1972.

A I don't remember.

Q Is it a copy of your payroll book for the week ending June 7, 1972?

A I don't believe so.

Q Have you ever seen it before?

A No.

Q And you deny that Gary Taibbi appears as your employee on your payroll for the week ending June 7th? When I say your payroll book I am speaking of Len-Al.

A I don't believe this is Len-Al's payroll book (indicating).

Q You deny he was your employee and on your payroll book for the week ending June 7th?

A That is correct.

Q Do you also deny Mr. Frida (phonetic) being on your payroll book for the week ending June 7th?

A I don't believe -- I can't be sure because I didn't handle the payroll book.

Q Mr. Frida was not a carpenter?

A No, he was an operation engineer, bulldozers.

Q You are not sure whether Mr. Frida was on your--

A He worked for Len-Al.

Q I am talking about the week ending June 7 --

A I can't be sure.

Q You would be sure if you looked at your payroll book?

A That is not ours.

Q I ask, you would be sure if you looked at your payroll book?

A Yes.

(Continued next page.)

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CROSS-EXAMINATION

BY MR. MEISELMAN: (Cont.)

Q And the only thing you really did on this job, and correct me if I am wrong, is to clear the land and loan some carpenters to your brother?

A More or less, that is correct.

MR. MEISELMAN: May I have this marked, please?

THE CLERK: Defendant' McNamara's exhibit AT for identification.

(So marked.)

Q I show you, sir, defendant McNamara's exhibit AT for identification and I ask you if it is a copy of the letterhead of Len-Al?

A That is the letterhead of Len-Al.

Q Are you familiar with your wife's signature?

A Yes.

Q Is your wife's signature on that letterhead?

A Yes.

Q In that letter -- that letter was addressed to Thomas McNamara?

A That is correct.

Q It was a letter in which -- what is the date of the letter?

A June 7th.

Q That was addressed to McNamara requesting money on this job, is thatcorrect?

A That is correct.

MR. MEISELMAN: I offer it in evidence.

MR. RITCHIE: Objection your Honor. It's rank hearsay. Rank incompetent hearsay.

May I see it?

(Pause.)

MR. RITCHIE: Your Honor, it is hearsay. I also question its relevance. My primary objection is on the ground of hearsay and lack of cross-examination.

THE COURT: No. I think it cannot be received in toto at this time without more support than the simple recognition of the signature of Mrs. Goberman by the witness.

Q Mr. Goberman, your wife Helen Goberman is the president of Len-Al Contracting, is that right?

A That is right.

Q Is there any other officer of Len-Al Contracting?

A No.

Q She is the spokesman on behalf of Len-Al Contracting?

A When she has to be.

Q She is the one who sent out the bills for

collection?

A That's right.

MR. MEISELMAN: I now offer it, if your Honor pleases.

THE COURT: That does not quite meet the point. You see, this is an assertion on the part of Len-Al.

MR. MEISELMAN: That is correct.

THE COURT: But Mr. Goberman has not vouched for that.

MR. MEISELMAN: This is by Len-Al, your Honor. And Mr. Goberman has been allowed to testify on behalf of what Len-Al did. I am not asking you to testify on other things he did.

THE COURT: If he knows about it.

Q Well, let me ask you this, sir, did Len-Al order and bill Mr. McNamara for equipment from Two Brothers Excavating, Inc.?

A Len-Al did not order work to be done by Two Brothers, it seems from the information I picked up he ordered under the name of Len-Al.

Q Did Len-Al pay for it?

A No.

Q Did Len-Al bill Mr. Thomas McNamara for it?

A I can't be sure. If we got the bill we might

have passed it on because it wasn't our bill.

MR. MEISELMAN: May I have this marked, please?

THE COURT: Yes.

THE CLERK: Defendant McNamara's exhibit AU for identification.

(So marked.)

Q I show you defendant McNamara's exhibit AU for identification and ask you, do you recognize it as a copy of a check made by Thomas McNamara to Len-Al?

THE COURT: What is the date of that?

Q What is the date of that?

A March 6th.

Q What is the amount?

A $45.

THE COURT: Four-five?

MR. MEISELMAN: Yes.

Q Is that correct?

A That's what it says, $45.

MR. MEISELMAN: May I have this marked, Mr. Tabak?

THE CLERK: Defendant McNamara's exhibit AV for identification.

(So marked.)

Q I show you defendant McNamara's exhibit AV for

identification and ask you whether it is not a check of Thomas McNamara dated March 6th, 1972, to the order of Len-Al Contracting Company, Inc. in the sum of $1,458?

MR. RITCHIE: Your Honor, I would only object --

A That is correct.

MR. RITCHIE: Mr. Meiselman is leading. If it's going to be offered in evidence, we already have it in evidence to begin with.

THE COURT: Yes, I know. Let's hurry along.

Q Isn't it a fact those two checks constitute payment to Len-Al for the work done by Two Brothers on this job?

A I can't be sure what this is paid for.

Q You don't know what Len-Al got the money for from Mr. McNamara?

A No.

Q You never seen these checks?

A No.

Q You never seen the bills to Thomas McNamara?

A They might have crossed my desk.

Q When bills went out to Thomas McNamara, didn't you question them?

A No.

Q You assumed that of course these bills were for

work done by Len-Al, didn't you?

A That is correct.

Q But you knew that Len-Al had not done any work?

A I didn't say that at all.

Q Except for clearing of land?

A Yes, and the loan of carpenters.

Q Other than that, did you see any other bills?

A No.

Q To Thomas McNamara?

A I can't say I did. I didn't take care of the bookkeeping.

Q That is your wife's job?

A That's right.

Q Do you have any knowledge of your company Len-Al having billed and being paid in excess of $10,000 for work allegedly done on this job?

A I don't have the slightest idea --

Q You are not a tremendous company, are you?

A No.

Q It's only you and your wife, is that right?

A That's right.

Q And you have no knowledge of over $10,000 having been received by your company for work allegedly performed on this job?

A I can say we did a million dollars worth of work last year, how can I remember --

MR. HTCHIE: Objection to the form. It is argumentative and assumes facts not in evidence.

THE COURT: He asked him whether he knew and his answer was he did not.

Q Do you know whether your company ordered material from contractors supply for this job?

A I can't be sure, no.

Q When you say you are not sure, what is your best recollection?

A There were fellows on the job calling up ordering things using our name Len-Al Contracting. We got bills later. You know, we sent them over to McNamara for payment.

Q In other words, you did get bills for this job and when you received those bills you billed McNamara?

A That is correct.

Q That's what I wanted to know.

Do you know the amount of those bills?

A No.

Q Did you or your company order work from the Action Crane Corporation?

A Len-Al Contractors didn't.

Q You're sure of that?

A I am sure. Maybe somebody ordered it in our name.

Q Do you know of anybody?

A Anybody can.

Q How about Harold Goberman?

A Anybody can.

Q When these bills came in, did you merely send them to Mr. McNamara or did you call up these various people to find out what it was about?

A I can't be sure. My wife might have done that, called up and found out what that was for and what this is for.

Q Would it be fair to say before your wife sent the bills to Mr. McNamara, she would verify that the work or material had actually been done?

A Yes. If these things were paid by McNamara, undoubtedly they were.

Q If I were to ask you the same question, Mr. Goberman, with respect to GEZ Construction Corporation, Steinman Building Materials, Rite Floor Corp., D. Brown Osler Supply Corporation, and Local Steel and Supply Company, would your answers be substantially the same?

A If I seen these bills, yes.

Q Now, I show you, sir, defendant's exhibit for identification AP, and I ask you to look at the papers attached to that letter?

A Well, these are all bills to Len-Al.

Q Are those bills that Len-Al asked for payment for from Mr. McNamara?

A Yes, they were.

MR. MEISELMAN: I offer it in evidence.

MR. RITCHIE: May I have a voir dire, your Honor?

THE COURT: This is all in the record generally. Nobody has put a ribbon on these and added up a total. Nobody checked the bill individually so the jurors don't have to do it themselves to see whether they do--

M R. MEISELMAN: There is a total on it, your Honor.

THE COURT: Where is it?

MR. MEISELMAN: On the third page. $10,459.

THE COURT: That is the whole shooting match. Who cares.

MR. RITCHIE: I would oppose this. He has no independent knowledge concerning this document.

THE COURT: Really, we would like to go on with the case.

MR. RITCHIE: I would like to too. I must oppose the admission of this into evidence.

(Continued next page.)

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THE COURT: It is excluded, because there was no sufficient foundation in evidence for it. Let us move along.

CROSS-EXAMINATION

BY MR. MEISELMAN: (Cont.)

Q On this job on Nesconset Highway, did you need any permit from the State Department or Transportation Department?

A Well, Len-Al didn't need nothing because Len-Al didn't have the job.

Q Anybody that did the job would need it?

A Yes, sir.

Q Is it not a fact that Len-Al is the company whose bond was supplied to the State Department of Transportation?

A Correct.

Q Isn't it a fact thatLen-Al's bond was charged the sum of $3,000 for that?

MR. RITCHIE: Objection.

A Not to my awareness. I am not aware of that.

Q Didn't your company ask Mr. McNamara for the return of $3,000 for the bond for the State Highway Department?

A It was probably asked to return the bond made

out for $3,000, which may be only a value of $20.

Q I see.

A Just what the insurance company charges you for the bond.

Q Can you tell me what the words mean:

Contract money taken as deposit to be returned to Len-Al Contractors, accepted by Harold Goberman and used on McNamara job, $3,000?

MR. RITCHIE: Your Honor, I must object. He is reading from a document not in evidence.

THE COURT: Yes.

Can you explain it to the jury, if you know what the item means?

THE WITNESS: Can I explain this?

THE COURT: Yes.

THE WITNESS: No, I cannot.

THE COURT: All right, next question.

Q Do you know if Mr. McNamara was billed $3,000 for that?

A Well, yes.

Q How much did Mr. McNamara pay you altogether, when I say "you" I am referring to Len-Al?

A I do not know.

Q Now, when you walked upstairs, you walked in from

the hall -- if I am wrong, correct me.

THE COURT: You are referring to June 5th?

MR. MEISELMAN: Yes.

Q You would walk into what would be considered as an outer room?

A Between the two offices --

Q You walked in from the hall to a room where there was secretaries and so forth?

A I believe so, right.

Q Beyond that there is another room where Mr. Thomas McNamara had this office?

A I am not sure whose office it was.

Q There was one room which seemed to be an outer room or a reception room with girls in it and there is another room?

A Right.

Q Can you tell me if there was any door between those two rooms?

A There was a door at that point between the two rooms?

Q I am asking you now, are you absolutely positively sure?

A Yes.

Q And are you absolutely positively sure that when

you came upstairs you walked into that room with your brother, the inner room?

A We walked through a hallway, through one room and into the back room.

Q And you walked into the room beyond, the inner room with your brother?

A That's correct, you had to pass through that room to get to the back room.

Q And you went into the back room with your brother?

A That's right.

Q On November 13, 1973, did you make a statement as follows --

MR. RITCHIE: Where?

THE COURT: What is the exhibit reference?

MR. MEISELMAN: There is none, but I would like to mark it as an exhibit now.

THE COURT: All right.

THE CLERK: Marked defendant McNamara's exhibit AW for identification.

(So marked.)

Q Did you say the following --

THE COURT: What was the date of that?

MR. MEISELMAN: November 13th, 1973.

Q (Continuing.) "We both got out of the car and went into the place downstairs. There was McNamara and his son John and several others. Then we went upstairs. I waited outside in the hall, the door was closed, Harold went inside with the others."

Did you make that statement?

A Who did I say that to?

Q Well sir, I show you defendant's exhibit AW, dated November 13, 1973, and I ask you if that is your signature on this page?

(Document shown to witness.)

A That's my signature.

Q And did you state what I have just read?

A That's right.

MR. MEISELMAN: Thank you.

THE WITNESS: Who did I say that to? Who was it given to?

Q Now sir, while you were outside in the hall and your brother went in, did you hear loud noises?

A Yes, I did.

Q Did you hear shouting coming from the inside?

A Yes, I did.

Q And on occasion the door would open and you could see inside?

A On one occasion the door entered, when they came out to get the registration.

Q Did you make the following statement on Novembe 13, 1973 and I quote:

"I could hear loud voices and shouting coming from inside."

MR. RITCHIE: Objection, your Honor. I am going to object unless we have the prior statement identified in some manner.

THE COURT: He has. He has asked the witness whether he has made those statements on November 23rd, 1973.

MR. RITCHIE: I think the witness has indicated that he does not know to whom he was alleged to have made the statements.

MR. MEISELMAN: Did he make the statement, your Honor, period.

THE COURT: Yes.

THE WITNESS: Can I say something, why I made this?

Q Did you make that statement?

A I made it.

Q Did you state that the door opened three or four times and you went inside?

A I made this statement --

Q Did you make that statement, sir?

A I am not sure.

Q Did you state and I quote:

"They were excited and all shouting at each other. Basically, the job was about money and the job itself. He was accused of taking kickbacks and the McNamaras felt the job wasn't going the right way."

Did you make that statement?

A Yes.

Q Did you finally make the statement:

"I make this statement freely and voluntarily with no threats, because it is the truth"?

A That's right.

Q And did you sign it right there?

A I signed it.

Q Did you also state: "I have given this information to the Government"?

A Yes, I did -- I assume I did.

I don't believe I went into detail with the defense attorney --

Q There is no question before you, Mr. Goberman. Thank you.

A You are welcome.

Q Now, sir, did you ever advise the Two Brothers Excavation Company that Tom McNamara is a conscientious man?

A I don't believe I ever talked to the Two Brothers personally.

Q Did you ever write a letter to the Two Brothers, in which you advised the Two Brothers that Mr. McNamara was a conscientious man?

A I don't believe I wrote a letter.

Q I show you defendant's exhibit ID for identification, and I ask you sir --

THE COURT: What was that?

MR. MEISELMAN: I beg your pardon, it is AO. I apologize to the Court.

Q (Continuing.) -- AO for identification, and I ask you if that is on the letterhead of Len-Al?

A Yes, it is my name signed by my wife.

Q Is that addressed to Two Brothers?

A Yes, it is.

Q Was that letter written in the regular course of business?

A It appears to be, yes.

MR. MEISELMAN: I offer it into evidence, your Honor.

MR. RITCHIE: Objection, it is not admissible

under 28 U. S. Code Section 1732.

THE COURT: Well, this is a statement made by whom?

MR. MEISELMAN: Len-Al Contractors.

THE COURT: Just on their letterhead?

MR. MEISELMAN: Yes, and this gentleman has stated it was in the regular course of their business that the letter was written.

MR. RITCHIE: He does not know where it was maintained, whether kept in his files. I do not believe he can establish -- lay a proper foundation under the business records act, number 1.

Number 2, he has stated that this is not his writing, it is a letter done by his wife with his wife's signature. It is his signature, but done by his wife.

THE COURT: You mean his name written by his wife.

MR. MEISELMAN: Yes.

MR. RITCHIE: Yes.

(Document shown to Court.)

THE COURT: It may be received in evidence.

THE CLERK: Defendant McNamara's exhibit AO in evidence.

THE COURT: The jury must have in mind that this is received simply as such a letter, so written. It is not, you will see, anything that is self-proving. What it says is an assertion of Len-Al Contracting Company, Inc. and what the facts are you have heard through other evidence.

If it will help to tie it in, I think, that Two Brothers Excavation is Mr. Tew's company, whom you will remember was a witness here earlier.

CROSS-EXAMINATION

BY MR. MEISELMAN: (Cont.)

Q Is your brother a trustworthy person --

MR. RITCHIE: Objection.

A That's depends on whose opinion.

Q I am asking you, your opinion --

THE COURT: Well --

A I really can't answer that.

MR. RITCHIE: I must object.

THE COURT: Yes, the objection must be sustained.

Q Have you formed any opinion as to your brother's trustworthiness?

THE COURT: Wouldn't make a blessed bit of difference. It would not be evidence before this jury. One of the issues before you members of the jury on

which your judgment will be sought is whether or not -from the point of view of his office as a witness in this case, you find Mr. Harold Goberman's testimony credible.

BY MR. MEISELMAN:

Q Mr. Goberman, this is an old building that you were in, am I correct?

A That's right.

Q Would it be fair to describe it as a rickety building?

A Not really.

Q Could you hear through those walls fairly easily?

A I would think so, yes.

Q You heard what was being said basically?

A Not word for word, mumbles, words -- words that were shouted out loud youcould hear clearly.

Q Would you say that there came a time when everybody was raising their voices in that room?

A Yes.

Q Including your brother?

A Not necessarily -- it's too hard to recall whose voices.

Q Was your brother arguing and shouting back?

A Yes.

Q You could hear him arguing and shouting back with the others, couldn't you?

A At one time.

Q At what time did you hear that?

A I can't say exactly what time.

Q It was a heated argument with your brother shouting and the other people shouting?

A That's right.

Q It wasn't a one-sided thing, was it?

A No.

Q It wasn't that your brother was just sitting in a chair calmly and everybody was shouting at him, he was shouting back, wasn't he?

A That's right at one time until he got shoved into the chair.

Q That was after he threw a punch at Tom McNamara?

A After Tom McNamara went to kick him.

Q Now, we have the whole point.

A Right.

Q You never saw -- other than the fact that your brother was shoved into a chair -- did you ever see your brother Harold hit?

A No.

Q Slapped?

A No.

Q Punched?

A No.

Q Anything?

A No.

Q Now, the first time you saw Detective Gill and he asked you if you had seen a gun and you unequivocally said no; is that right?

A That's right.

Q Right?

A Right.

Q Did you say there was a gun the second time you spoke to Mr. Gill?

A I can't remember the exact words I used.

(Continued next page.)

HS/LH 3/2

Q Well, did you intend to imply in substance or otherwise when you testified an hour or two ago that you told Agent Gill, when you spoke to him the second time, that there was a gun?

A That's what I implied.

Q You implied that?

A Right.

Q And I believe you said that you assumed that your brother had spoken to Officer Gill earlier that day and you said to Officer Gill, "Whatever my brother said is true"?

A That's correct.

Q But you didn't know what your brother had said, did you?

A No, except being that he had mentioned he had the gun and I assumed that he heard the whole story --

Q But you didn't know what your brother had told him earlier that day?

A No.

Q As a matter of fact, were you asked these questions and did you give these answers --

MR. RITCHIE: The page, please?

MR. MEISELMAN: 1276.

Q (Continuing) "Question: And did Detective Gill as you that night whether or not you saw a gun?

"Answer: Yes.

"Question: What did you say or do?

"Answer: What I said was, 'Well you heard the story to that effect, believe what you want' or to the effect 'Well, you know Harold.'

"Question: You sort of shook your head?

"Answer: Right.

"If you wanted to do something about it, if not, you heard the story before.

"Question: When you say you said to Detective Gill like this -- you know Harold, were you telling him that Harold is full of baloney and he knew it?

"Answer: No, not -- generally that's what I was saying. I was going to say -- well, what I meant by that simply was, what else is new? He's always getting into trouble, so take it for what it is worth. I wasn't going to stick up for him and say 'Yes, there was a gun' -- you know -- and start a big commotion. You know, that's it.

"Question: So actually twice, the other incidents when you said there was no gun was a separate time; isn't that right?

"Answer: That's right."

Were you asked those questions and did you give those answers --

MR. RITCHIE: I will object unless the remainder of that page and the top of the next page is read.

I will offer it to your Honor.

THE COURT: Well, would you mind reading it, Mr. Meiselman.

MR. MEISELMAN: I do not remember where I stopped.

MR. RITCHIE: Line 18 on 1277.

MR. MEISELMAN: "Question: Then you were asked by Detective Gill, was there a gun and you said 'No.'

"Answer: I didn't say 'No.'

"Question: What did you say?

"Answer: I said what I told you, I believe what I said to him was what Harold was saying was the truth. It all happened, but you know so what."

Were you asked those questions, and did you give those answers?

THE WITNESS: Yes.

Q You didn't say to Detective Gill that there was a gun, you just said to him that whatever Harold said was the truth; isn't that so?

A It's too hard to really say what I said.

Q So you don't remember?

A Other than what is in writing, that is correct -- other than what I just said before.

Q I said about an hour or two before you were fairly sure -- quite sure on the second occasion that you told Detective Gill that you had seen a gun?

A That's correct.

Q Now you recall that you don't remember?

MR. RITCHIE: Objection to the form of that question.

THE COURT: It is argumentative. Objection sustained.

Q As a matter of fact, when your wife was present, Detective Gill said to you in effect -- in words or substance, "Allan did you really see a gun?" And you told him "No."

A That's right.

Q After you left the building -- by the way, you didn't go to the bank, did you?

A No, I did not.

Q When your brother returned from the bank, what did you then do -- what if anything did your brother do that you could see?

A I can't exactly remember.

We might have had some small talk and left, but I remember there was a conversation about a couple of guys involved going across the street to have a drink and talk.

Q Did your brother go into a bar and have some drinks?

A He might have. I cannot be sure.

Q Did he go with you?

A No, not with me.

Q Who did he go with?

A The fellows that were involved going to the bank with them.

Q They came back from the bank and all of them who had gone to the bank with him went into a bar with him?

A I don't believe all of them went, I believe two

Q Who went?

A I don't know.

Q Do you have any recollection at all?

A No.

Q Where were you at the time they were in this bar having a drink?

A I was sitting on the fence waiting for him to come back.

Q How long was your brother in the bar?

A I am not even sure that he was in the bar. I cannot be sure.

Q You have no recollection of what happened after your brother came back from the bank?

A I recall leaving --

Q Do you recall leaving with your brother?

A Yes.

Q Are you sure?

A I caN't be sure. I don't believe I left alone.

Q Is it a fact that you did leave alone and your brother came afterwards?

A I can't be sure of that. It doesn't seem likely. We came in one car.

Q I am not asking you what is likely, I am asking if you know a fact?

A I don't know. I can't recall.

MR. MEISELMAN: Your HOnor, may we have a recess for just a few moments?

THE COURT: We will have a short recess, members of the jury. Please do not discuss the case with one another or anyone not on the jury until it is given to you to decide.

(Recess taken.)

MR. RITCHIE: Could we lower the thermostat? Everybody has been commenting.

THE COURT: This has been so sudden.

MR. MEISELMAN: I have no further questions, your Honor.

THE COURT: Mr. Fischetti?

MR. FISCHETTI: I have a question or two.

CROSS-EXAMINATION

BY MR. FISCHETTI:

Q My name is Fischetti and I represent John DeLiso, whom you identified in this courtroom, so there is no mistake. Please stand.

(Defendant DeLiso stands.)

This is John DeLiso.

A I will try to remember that.

Q Let me direct your attention to June 5, 1972. You testified on direct that eventually you got to a place which was the McNamara's; is that correct?

A Right.

Q And in your company was your brother, Harold Goberman; is that correct?

A I don't follow exactly.

Q Harold Goberman was with you?

A Correct.

Q There came a time when you went into a room where there were other gentlemen seated?

A No, they were not seated.

Q They were in the room?

A Right.

Q There came a time -- a point in time when you were asked to leave?

A Yes.

Q And you left in the company of an individual?

A That's correct.

Q And is it your testimony that while you were outside this room, with this individual, that's what you heard this commotion?

A That's correct.

Q I understood you to say that there came a point in time when you saw a gun?

A Correct.

Q Were you inside the room or outside the room when you saw the gun?

A I was just walking into the room.

Q With the individual who was outside with you?

A Correct.

Q So the fellow outside with you was not the fellow with the gun?

A That's correct.

Q Now, you also said that this fellow was outside with you -- stayed downstairs with you after this meeting was over?

A Right.

Q You also testified that you sat on a fence?

A That's right, it was a split rail fence. You could sit on it easily.

Q You were asked by Mr. Ritchie to look around the courtroom and I believe you did attempt to identify the person who was outside the room with you?

A That's correct.

Q Your testimony was, as I recall, that you could not do that?

A That's correct.

Q Would you look around again and be doubly sure?

A When I look around again I look at someone who I think might have been the fellow who was standing with me, but I cannot be sure.

Q You mean you think you see the fellow standing with you?

A I think so, but I can't be sure.

Q Who do you think?

A The first fellow sitting in the first row, but I cannot be sure.

Q This gentleman here (indicating)?

A Right.

Q But it is no one at this counsel table, that you are sure of?

A That I believe -- that I am sure of.

Q Several times during the course of your direct examination Mr. Ritchie showed you prior testimony in January; is that correct?

A That's correct.

Q That refreshed your recollection?

A That's correct.

Q Is it fair to say, Mr. Goberman, that your recollection of those events was better in January of 1974 than it is today?

A Yes, I would say so.

Q Would it be fair to say that it was better in October of 1972?

A Yes.

Q Than it is today?

A Definitely.

Q Now, do you remember in October of 1972 being interviewed by Agent McMullen?

A Yes.

Q You know who he is?

A Yes.

Q This gentleman seated at counsel table (indicating)?

A Right.

Q When did this interview take place, do you recall?

A In my house at the kitchen table.

Q And he asked you questions and you gave him answers?

A I do not believe he asked me questions. I think he wanted a statement from me.

Q And you gave him the statement?

A That is right.

Q Told him everything you knew about it at the time, to the best of your ability?

A Correct.

Q This was in October of the same year?

A I am not sure whether it is October or when -- while they were doing their investigation before the trial.

Q In 1972?

A Right.

Q Did he show you any pictures?

A Yes, he did.

Q Did you identify any pictures?

A I did.

Q Did you recall Mr. Goberman telling Agent McMullen that John DeLiso, my client, was the gentleman that was outside the room with you on June 5th?

A I don't recall that.

MR. FISCHETTI: Let me see if I can refresh your recollection.

May the record indicate that I am showing the witness what has been marked as 3500-22, a report by Agent McMullen.

Q Would you look at this now, Mr. Goberman, particularly the middle paragraph.

Does that say that John DeLiso was instructed to stand outside the door with you?

A Yes, it does.

MR. RITCHIE: Objection, your Honor. This was presented to refresh his recollection.

Q Does it refresh your recollection?

A Yes.

Q Do you remember telling Agent McMullen that it was John DeLiso outside the door?

A I think I picked a photograph. I did not say what name or where.

Q And the photograph was of John DeLiso, was it not?

A I am not sure.

MR. FISCHETTI: I ask for a representation by the Government as to which photograph Mr. Goberma

picked out, who he says was outside the door.

MR. RITCHIE: Your Honor --

THE COURT: I am not sure the question is at all understandable.

MR. FISCHETTI: Shall we do it at side bar?

THE COURT: The question is not comprehensible. Could you rephrase it, please?

MR. FISCHETTI: I ask Mr. Ritchie to represent what I knew to be a fact from the information supplied to me by the 3500 Material, that the photograph shown --

THE COURT: Just a moment, please.

You cannot make assertions of that sort.

MR. RITCHIE: I will assert, your Honor, that on that day -- according to the report of Mr. McMullen that -- that Mr. Allan Goberman did identify a photo of John DeLiso.

I will also represent that the report of interview states that this John DeLiso was the individual who was standing outside in the hall.

THE COURT: Who Mr. Allan Goberman stated to Mr. McMullen was the man that stood outside with?

MR. RITCHIE: Yes, as Mr. McMullen reported in his report of interview.

THE COURT: Yes.

Q Do you understand it now, Mr. Goberman, the picture that was shown to you was the picture of John DeLiso?

A Yes.

Q And that's the picture that you identified to Mr. McMullen, do you understand that?

A Yes.

Q And that's the picture that you say in this report was the individual --

A I don't remember --

Q -- who stayed outside the door?

A I don't recall, but if it says it there it must be what I recalled at that time and so it must be what I thought was the truth.

(Continued on next page)

EK fls.

Q Let me ask you this, after you spoke to Mr. McMullen did you testify in the Grand Jury?

A Yes, I did.

Q And in that Grand Jury were you asked questions by an Assistant United States Attorney?

A At that time Dave Ritchie.

Q Mr. Ritchie asked you questions and you gave him answers?

A Right.

Q Do you recall saying in the Grand Jury that the individual who stood outside the door with you was on the photograph that you had identified, John DeLiso?

MR. RITCHIE: Objection, your Honor.

A I don't recall it.

MR. RITCHIE: Can we have the questions and answers read?

THE COURT: Yes, that is the best way to do it.

MR. FISCHETTI: Page 3, Grand Jury testimony.

Q "Question: Was someone instructed to stand outside the door with you?

"Answer: Yes.

"Question: You identified a photograph of that person?

"Answer: Right."

The person who was instructed to stand outside the door with you, Mr. Goberman, was the person whose picture you identified for Mr. McMullen; is that correct?

A I can't recall it, so whatever I said there at the time it was fresher in my mind. I recalled it at the time, I can't recall it, I can't swear who, where, you know, exactly what pictures.

Q Well, can you swear right now under oath that John DeLiso was in that room and not outside the room with you?

A You told me just now that my testimony had said that he was outside of the hall with me, I would go with that, I wouldn't swear that he was in the room because that was fresher in my mind at the time.

Q So in other words when you testified on direct examination that Mr. DeLiso was in the room at that time --

A That is right --

Q (Continuing) -- that is not true?

A That is what I believe, that is what I believe.

Q You think that he was in that room at that time?

A That is right.

Q That is your best recollection at the present moment?

A At the present time that is my best recollection.

MR. FISCHETTI: May I just have a moment, Judge.

THE COURT: Yes.

Q Now, you identified someone else in this courtroom who is not seated at counsel table as being there on June 5th; is that correct?

THE COURT: As being what?

MR. FISCHETTI: As being there on June 5th.

Q Is that right?

A That is correct.

Q And it was this gentleman in the front row (indicating)?

A I can't swear to that, I said that fellow, I thought it could have been the fellow that was standing in the hallway with me, but I can't be sure.

MR. FISCHETTI: May I ask this individual to stand up, your Honor?

(A gentleman in the front row in the back part of the courtroom then stood.)

MR. FISCHETTI: Your Honor, may I have him give his name for the record.

GENTLEMAN IN FRONT ROW: Angelo Merolla.

THE COURT: Angelo?

GENTLEMAN IN FRONT ROW: Merolla.

BY MR. FISCHETTI:

Q That is Angelo Merolla.

Does his name help you?

A No, the name doesn't help me at all, it is not that I --

Q Can you say that he was the name who was standing outside?

A No, I said I thought him to be the man at this time.

Q The man who was standing outside with you, Mr. Goberman, how long were you with him?

A How long?

Q How long were you with him, about?

A 15 minutes, half hour.

Q Did you have a conversation with him?

A Small talk.

Q Did you tell us on direct you learned that you had known him?

A Yes, I was surprised, he had told me at that time that he remembers me from a job in Sandremo that I had done back in '62 or something, and at that time, you know, it flashed back meeting this fellow, but it was just a passing meeting.

Q Did he tell you his name?

A I can't recall it.

Q Can you describe him for us?

A I recall him being a much smaller fellow than the man sitting in the front row.

Q Smaller?

A Thinner.

Q Can you describe him in comparison with Mr. DeLiso?

MR. FISCHETTI: Stand up, John, stand up.

(At this point John DeLiso stood at counsel table.)

Q Would you say he was heavier than Mr. DeLiso or what?

A No, I would say thinner.

Q Thinner than Mr. DeLiso?

A Right.

Q Taller or shorter?

A Shorter, maybe an inch or so.

Q Anything else distinguishing him about his character that you can tell us?

A I believe he had a ruddy complexion.

Q Younger or older?

A Younger.

MR. FISCHETTI: Sit down.

(The defendant John DeLiso then sat in the courtroom.)

Q There is no doubt in your mind that the man who was outside that room with you could not have had a gun passed, a gun, or that he yelled, shouted or did anything?

A That is correct, he wasn't involved in the conversations in the room in any way, he wasn't with them in any way.

Q That was the man that sat on the fence with you?

A That is correct.

MR. FISCHETTI: I have no further questions, nothing further, sir.

MR. LEONE: Judge --

(At this point Ms. Seltzer stood in the courtroom.

THE COURT: Do you yield?

MR. LEONE: Yes.

MS. SELTZER: Thank you, Mr. Leone.

MR. LEONE: Surely.

MS. SELTZER: I will be very brief.

CONTINUED CROSS-EXAMINATION

BY MS. SELTZER:

Q Mr. Goberman, my name is Marion Seltzer and I represent Alphonse Mr. Merolla, the person whom you referred to as the third gentleman seated in the right side of the table

Now, I believe that you testified this morning or was it this afternoon that you saw John DeLiso give Alpho Merolla a gun?

A That is correct.

Q You did testify to that?

A That is right.

Q And is that what you say is what occurred on June 5th?

A Part of the incidents that occurred, yes.

Q And isn't it a fact that this is the first tim that you ever told anyone anywhere that John DeLiso gave Alphonse Merolla a gun?

A That is correct.

Q This is the first time?

A Well, other than other testimony from previous trials.

Q Isn't it a fact that you have never testified to that fact before?

A I said that it was being --

Q Wait, you can answer yes or no or you don't know.

A What is the question.

Q I will withdraw the question.

You spoke to Agent McMullen in October of 1972,

is that correct?

A That is correct.

(Continued on next page)

Q This is the same conversation that Mr. Fischetti was just referring to?

A Right.

Q You were just shown a copy of a report made by Agent McMullen on that day.

MS. SELTZER: This is 3500, I believe it is 22.

MR. FISCHETTI: 22.

Q Now, in one part -- that is the conversation wherein you were shown pictures; is that correct?

A That is on one occasion that I was shown pictures.

Q And on that occasion, you identified one of those pictures as being that of Alphonse M. Merolla?

A I can't be sure who it was right now.

Q But did you identify the picture of Mr. Merolla?

A I identified pictures on two different occasions and I don't recall whom I picked out at either occasion.

Q Well, would you look at the underlining in that report?

A It says here that I --

Q Will you just read it to yourself, okay?

(The witness perused the document.)

Does that refresh your recollection as to whether or not you picked out a picture?

A No, it doesn't.

MR. RITCHIE: Your Honor, may I just see what is underlined, it is not underlined on mine.

THE COURT: So you will know what the question is.

MR. RITCHIE: Yes, your Honor.

MS. SELTZER: The first underlining.

Q Does that refresh your recollection as to whether or not you picked out a picture of someone who had been --

A It doesn't -- I will wait until I can answer yes or no.

Q (Continuing) -- someone who had been in the room on June 5th, 1972?

A No.

Q Did you pick out a picture of Alphonse M. Merolla?

A No, I am not sure whom I identified at that time.

Q Did you pick out a picture of a man whom you said was in the room?

A Yes.

Q Was that a picture that Agent McMullen had identified in his report as Alphonse M. Merolla?

A If that is in Agent McMullen's report, then that is whom I identified, and that is John DeLiso.

Q And I refer you to the bottom of that report which is also underlined in red where you had a discussion allegedly with Agent McMullen about the presence of a gun on June 5th?

A Yes.

Q Now, does it say anywhere in that report that you ever told AGent McMullen that Alphonse Merolla was given a gun by John DeLiso?

A No.

Q Is there any mention of Alphonse M. Merolla in that conversation with Agent McMullen about a gun being had by Alphonse M. Merolla?

A No.

MR. RITCHIE: I object to the form, your Honor.

Q Did you ever tell --

THE COURT: He has already answered, Mr. Ritchie.

Q Do you also recall testifying before the Grand Jury on the same subject in November of 1972; is that correct?

A Yes.

Q And is that the same Grand Jury testimony that Mr. Fischetti questioned you about?

A I only went to one Grand Jury, so it had to have been.

Q Did you ever recall if you ever told the Grand

Jury that Alphonse M. Merolla was given a gun or that he put a gun in a holster?

A I don't believe I ever identified names.

Q Well, do you recall you were shown pictures at the Grand Jury of any of the people involved?

A I don't believe I was shown pictures at the Grand Jury.

Q Well --

A I can't remember if I was or wasn't, I don't believe so, though.

Q Let me just -- I draw your attention to Line 16 through 19 on Page 4 of your Grand Jury testimony.

Is there any mention there that you ever referred to the fact that John DeLiso handed Alphonse Merolla the gun?

A No.

MR. RITCHIE: I object, your Honor, I don't think it is a fair question in light of the testimony.

May I offer this --

Q Is there any --

THE COURT: Just a minute.

(At this point Mr. Ritchie handed the testimony to the Court.)

THE COURT: Well, if the only testimony on it

is LIne 14 to 22, then I don't quite see that it can b presented to him that way.

I think the jury would have to hear all the questions and answers to get the fair import of the questions and his answer to your precise question.

MS. SELTZER: Well, I will rephrase the questio

Q Did you tell the Grand Jury at any time whether in those lines or in any other part of your testimony that the man whom you identified as being John DeLiso gave the man whom you identified as being Alphonse M. Merolla a gun?

A I don't believe --

MR. RITCHIE: Objection.

THE COURT: That is the question to which an objection has been sustained.

MS. SELTZER: Okay, I will redraw that questi your Honor.

BY MS. SELTZER:

Q Did you testify at the previous trial in this matter?

A Yes, I did.

(Continued on next page)

MP fls.

Q Do you recall if you told the jury at that time that you had ever seen John DeLiso give Alphonse Merol a gun?

A I am not sure what my testimony was at that ti

Q Did you testify at that time to what you remember to be facts?

A Yes.

Q Were you more sure at that time or are you mor sure today?

A I must have been more sure at that time than today.

Q What about when you spoke to Agent McMullen, were you more sure in October, '72 or more sure today?

A I don't know.

Q Do you recall -- withdrawn.

You testified today, is it not a fact, that you saw or you were -- excuse me. I withdraw that.

You testified before that you must have been more accurate in the earlier part of your testimony, is that correct?

A Yes.

Q The earlier testimony that you had given was that John DeLiso, this gentleman, was outside with you?

A That --

MR. RITCHIE: Objection. He never gave --

THE COURT: That was the statement to Mr. McMullen, I believe.

Q Would your testimony that the earlier statements that you gave were in your belief the most accurate?

A Yes.

Q Isn't it a fact the earlier statements that you gave with regard to this matter that are in fact that it was John DeLiso outside with you?

A I am not sure because -- I will go along with what I said.

Q Did Mr. Fischetti refresh your recollection?

A I am not sure. I was getting too confused. You have to clear who, what, where. I am a little lost.

Q Is it your statement today, and correct me if I am wrong, your feeling is that your earliest recollection on what happened on June 5th are the most accurate?

A That is correct.

Q Then it is your feeling that you were correct when you testified that John DeLiso was outside with you?

A That's what I testified --

MR. RITCHIE: Objection.

MS. SELTZER: Excuse me. When he spoke to Agent McMullen.

THE COURT: There is quite a difference. When you made the statement to Mr. McMullen.

BY MS. SELTZER:

Q Is it your contention now that that was the most accurate of your statements?

A That was the most accurate.

Q I ask you again, who, according to what you believe, was outside with you on June 5th, 1972?

MR. RITCHIE: Objection.

A I don't know. What did I tell Agent McMullen?

Q You told Agent McMullen that John DeLiso --

A Then he was.

Q You were incorrect on what you said this morning

A If that is the fact, then it is true.

Q Do you recall testifying in a previous trial?

A Yes.

Q Do you recall testifying at that time -- I will withdraw that.

When you left on June 5th, 1972, you left with your brother Harold Goberman?

A I believe I did.

Q Did you have any discussion with him about what had gone on in the room?

A No.

Q Did he ever tell you he had been beaten?

A No.

Q Did he ever tell you he had been slapped?

A No.

Q Did he mention in any way whatever anything had been done to him in that room?

A No.

Q Where did you go when you left on June 5th, 1972?

A I must of went home.

Q Did your brother go across the street into a bar called the Elk and have a drink?

A I don't recall if he was with them. I recall guys going across the street to have a drink.

Q Do you recall your brother and Al Merolla went across the street?

A I don't recall who the gentlemen were.

Q Did some of the people from the room go across the street to have a drink?

A Yes. Who, I don't know.

Q But it was some of the people in the room?

A That's right.

Q Could have been Al Merolla?

MR. RITCHIE: Objection.

A Could have been.

Q Was it any of the McNamara's?

A I don't recall the McNamara's going across the street.

THE COURT: Just a minute. Do not answer when you see the Government counsel rising to object. That means that he considers the question inappropriate and one that should not be answered. If you answer it before he has a chance to phrase his objection you are defeating the purpose. Do not do it again.

THE WITNESS: Yes, your Honor.

MS. SELTZER: I am sorry, was there an objection?

MR. RITCHIE: There had been an objection but the question was answered.

THE COURT: I think Mr. Goberman overruled it if I may put it that way.

Q But you do have a recollection of some of the people --

A That is correct.

Q Going for a drink?

A Yes.

Q Do you have a recollection of what your brother Harold Goberman did?

A I don't recall.

Q If I were to tell you that your brother testified that he went across the street for a drink would you consider that that is a possibility, that is true?

A Very much so.

MR. RITCHIE: Objection.

THE COURT: Does that refresh your recollection.

Q Does that refresh your recollection?

A Yes.

Q Now, what does it refresh your recollection as to?

MR. RITCHIE: Objection to this entire line of testimony, your Honor.

If she doesn't know what it refreshes his recollection as to, then that --

THE COURT: As to whether or not your brother went across the street into a bar or what you thought was a bar.

THE WITNESS: I recollect one parties name. And possibly my brother going with them and thinking how strange, he was just beat up and now he goes across the street to drink with them.

Q He never told you that?

No, this is what ran through my mind.

Q He never mentioned to you that happened?

A No.

Q Did you have any business dealings with Alphonse M. Merolla at any time?

A (No response.)

Q The third man? (Indicating.)

A I am not exactly sure.

Q Just answer me yes or no, or you don't know?

A I can't answer with a yes or no.

Q Did your brother have any business dealings with Alphonse M. Merolla?

A Again, I am not sure if something can be considered as a business dealing.

Q Did he have any dealings other than that which involved the McNamaras to your knowledge?

A One time.

Q Yes or no?

A Maybe.

Q And did you ever have dealings with Alphonse M. Merolla about anything other than things to do with the McNamaras, yes or no?

A Possibly.

MS. SELTZER: I have no further questions.

CROSS-EXAMINATION

BY MR. LEONE:

Q Mr. Goberman, my name is John Leone and I

represent Alphonse Merolla. He is the gentleman in the brown suit (indicating).

Mr. Goberman, you testified on direct examinati that on June 5th, 1972, you saw Alphonse Merolla in Mr. McNam Office, is that correct?

A That's right.

Q Now, prior to June 5th, 1972, had you ever seen this man?

A No.

Q Would you tell us, Mr. Goberman, where in the room you say you saw this man?

A In the southwest corner.

Q That's what I thought.

Approximately five feet from you?

A Yes.

Q What if anything was he doing?

A Standing there.

Q Did he speak to you?

A Not that I recall.

Q Did you speak to him?

A No.

Q Approximately how long would you say you had him under observation?

A (No response.)

Q Approximately?

A Ten minutes.

Q Ten minutes?

A Ten minutes.

Q You mean you were looking at him standing in the corner for ten minutes?

A No. My observation of him was -- I was present in the room for five minutes, came back in five minutes later all told maybe ten minutes. I wasn't looking at him for ten minutes.

Q Did you look at his face?

A Yes.

Q Do you know how he was dressed?

A No.

Q You just looked at his face?

A That's right. The eyes focus in with the face.

Q If you look at somebody from five feet away, is it fair to say you see something other than his face, unless his body is blocked off?

A Yes.

Q You can't tell us how he was dressed?

A No.

Q After June 5th, did you ever see him again in 1972?

A (No response.)

Q Personally?

A No, unless it was at a court.

Q 1972 you saw him in court?

A No. Now I know I did not.

Q I asked a simple question. After January 5th, did you ever see him again in 1972?

A No.

THE COURT: After what date?

MR. LEONE: January 5th.

THE COURT: January 5th?

MR. LEONE: June 5th, I'm sorry.

THE COURT: It makes a difference.

Q Have you ever seen him again in person?

A No.

Q When is the next time that you ever saw this man in person?

A I never seen him in person.

Q Since June 5th, 1972?

A Yesterday.

Q Yesterday?

A Right.

Q And yesterday you saw him where?

A Right here in the courtroom.

Q Sitting in this courtroom?

A Yes.

Q Where were you?

A Sitting right here (indicating).

Q That was yesterday afternoon?

A Yes.

Q That's while this jury was in the outer room, is that right?

A Yes.

Q That is the next time you had ever seen this man in your life personally, right?

A As I recollect, that is right.

Q You are positive as you sit there now?

A No.

Q Is this the man you saw on June 5th, 1972?

A Yes.

Q What?

A Yes.

Q You started to say something?

A I said no to the first question and yes to the second.

Q You are positive?

A Start over again.

Q Are you positive, sir, as you sit there now,

that this is the same man who was in the room on June 5th, 1972?

A That is correct, yes.

Q You have a good memory?

A No. I don't think so.

Q You don't have a good memory?

A No, I don't think so.

Q You saw a man for a few minutes, ten minutes —

A That's right.

Q And he never said anything to you?

A Right.

Q And you never said anything to him?

A That's right.

Q You are willing to sit there and say you are positive this is the man?

A Or else he had a double.

Q Yesterday when you testified here, Mr. Goberman, when the jury was inside, did you tell us that you were positive you had seen this man in this courtroom in January of 1974?

A That is correct, I did.

Q You said you were positive?

A Yes.

Q As a matter of fact, you told the judge that you remember picking him out, isn't that correct?.

A Correct.

Q In January?

A Yes.

Q And then I told you, sir, in January of 1974, this man was never in this courtroom?

A That is correct.

Q He was never on trial?

A That is correct.

MR. RITCHIE: Objection.

Q You said you must have been mistaken, right?

A Yes.

MR. RITCHIE: I object to the form of the question by defense counsel. All the questions are phrased in the form of statements and not in the form of questions.

THE COURT: I think he has followed each by saying "Is that right?"

MR. RITCHIE: He missed a few.

THE COURT: Which I gather takes the curse off, Mr. Ritchie.

MR. LEONE: Rather than read the transcript --

THE COURT: It is quicker this way.

MR. LEONE: Right.

Q You made a mistake yesterday?

A Yes.

Q You were positive?

A Yes.

Q There is no chance making a mistake now about his being in the room on June 5th, 1972?

A Unless he had a double.

Q Did he have a double January 4th when you swore you were positive you picked him out in this courtroom?

MR. RITCHIE: Objection, your Honor.

THE COURT: Sustained.

A June 5th?

Q As a matter of fact, yesterday afternoon, after you stated that you were positive that you picked him out in January, on January 5th, 1974, do you recall my asking how he was dressed?

A That's right.

Q Do you recall telling me he was wearing a suit?

A That's right.

Q Do you recall telling me that you remembered that he was sitting approximately in the same place?

A Yes.

Q You told me you were positive?

A Yes.

Q You made a mistake?

A That's right.

Q How did you find out you made a mistake?

A As soon as I left here --

Q Didn't I tell you and didn't the Judge tell you he wasn't on trial in January?

A That is true but I later recollected. I had time to think about it when I was driving home.

MR. LEONE: I see. No further questions.

REDIRECT EXAMINATION

BY MR. RITCHIE:

Q Yesterday, did you identify that individual as having been present on June 5th?

A Yes.

Q When you testified previously on January 15th, 1974 --

A Yes.

Q At that time, did you identify certain individuals who had been present in the room?

A Yes.

(Continued on next page)

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Q Do you recall at the present time how many individuals you did identify on January 15?

MR. LEONE: What year?

MR. RITCHIE: 1974.

A I believe it to be five.

Q And do you recall which of the five you had identified?

A I identified the one that was standing in the hallway with me, who I do not see here today, and John DeLiso, the third gentleman back --

Q That is Alphonse M. Merolla?

A Right.

Q Did you identify any other individuals?

A John McNamara, Tom McNamara.

Q And during the course of Mr. Meiselman's cross-examination of you, did there come a time you were asked certain wuestions about a statement that you had given in November of 1973?

A Correct.

Q And can you identify for this Court and this jury exactly what it was -- that statement, who it was given to?

THE COURT: The occasion, and the person to whom it was given.

MR. RITCHIE: Yes, your Honor.

A It was given to one of the Investigators for the McNamara defense.

MR. RITCHIE: May I see it?

(Document handed to counsel.)

THE COURT: I think Mr. Meiselman marked it AW.

MR. MEISELMAN: Yes, I have it here.

Q Is this statement in the form of a question to you -- a question that is one page long --

MR. MEISELMAN: I do not understand that question.

A Neither do I.

THE COURT: What he said was, Didn't you simply answer Yes to a question that was a full page long?

Is that it?

MR. RITCHIE: That's what I meant to say. I think your Honor has put it better.

THE WITNESS: Yes.

Q Did you write that entire page?

A No, I wasn't doing the writing.

Q You had spoken with the Investigator previous to the preparation of this, though, had you not?

A The Investigator was writing this as I was talking.

Q You were then asked if that statement was true, and you had a very short space to answer yes or no?

A That's correct.

Q You then signed your name?

A Right.

Q Is that correct?

A That's correct.

Q Now, on what data -- On what observations or things that you heard did you base your conclusion on June 5th that your brother had been beaten --

MR. MEISELMAN: Objection, your Honor.

MR. LEONE: Objection.

THE COURT: I think he has already told us his observations.

Q Did your brother tell you he was beaten?

A No.

Q On June the 5th, do you conclude that your brother had been beaten?

MR. MEISELMAN: Objection.

THE COURT: No, he may answer that, in view of one of the earlier answers on cross-examination, which he was asked about, which in substance assumed that is a fact known to him on June 5.

A I concluded in my mind that he was.

Q Now, what mode of transportation did you use to get home on the night of June 5th?

THE COURT: How did you get home?

A I probably drove home the way I got there.

THE COURT: Whose car?

THE WITNESS: The car Harold was driving -- a company car driven by Harold.

MR. RITCHIE: I have no further questions, your Honor.

RECROSS EXAMINATION

BY MR. MEISELMAN:

Q When for the first time did you conclude in your mind that your brother was beaten on June 5?

A Right there at that time.

Q And you were in his company later, were you not?

A Correct.

Q And you were driving together in a car?

A Right.

Q And he never discussed it with you? And you never discussed it with him?

A That is right.

MR. MEISELMAN: No further questions.

MS. SELTZER: One question.

RECROSS EXAMINATION

BY MS. SELTZER:

Q Did you ever suggest that he go to a doctor, or anything?

THE WITNESS: No.

MR. RITCHIE: Objection, your Honor.

THE COURT: She may ask the question. It has already been asked.

In case you are not near the end of your testimony, please give Government counsel a chance to have his objections ruled on before answering.

MS. SELTZER: I will withdraw the question.

MR. RITCHIE: Anything further?

MR. LEONE: No further questions.

MR. RITCHIE: I have no further questions.

THE COURT: All right, Mr. Goberman, you are excused.

We will adjourn now, Members of the Jury, until 10:00 o'clock tomorrow morning.

Please do not discuss the case with one another, or anyone not on the jury until it is given to you to decide.

(Jury leaves courtroom.)

THE COURT: Yes?

MR. GILLEN: Yesterday I inquired inquired as to when the Government thought it would be winding up its case.

THE COURT: When they would get restful.

MR. GILLEN: Yes.

THE COURT: I thought we'd better be able to answer that question today, because I expected Mr. Allen Goberman would be called today, and he has been.

Does Mr. McMillan have news for us?

MR. RITCHIE: Your Honor, I will give an estimate -- I had assumed that it would be today. I had nine witnesses here today.

THE COURT: How many?

MR. RITCHIE: I had nine witnesses here today, and I had one or two more for tomorrow that I would have brought in if the testimony was going quickly.

I how have seven, plus a couple of more. I should be concluded by Friday.

I apologize to Mr. Gillen.

MR. GILLEN: I have a number of problems.

One, I would like some idea -- We can't be precise -- I'd like to know, is the Government going to call Miss Tomaselli, and if they are, I would like to have her 3500 Material of this interview that was had, and if they are not, I would like to have it anyway, because it is my witness in the first instance.

MR. RITCHIE: Your Honor, I am not going to stand on Congressional guarantees to the Executive Branch.

I will turn it over to Mr. Gillen to ease this proceeding. I am doubtful after this last interview that I will in fact call her. I will not state at this time that I won't call her. She is under subpoena. As the trial goes on, there may develop something which I feel her testimony is needed for. I will turn over the material now. We have marked as an Exhibit in this case the original notes regarding that last interview with Miss Tomaselli. Your Honor requested their preservation, and I will turn them over.

THE COURT: Yes.

AGENT MC MULLEN: If I may raise the question?

We talked about "original notes." There were two sets of --

THE COURT: There was the rough script, and the scratch notes.

AGENT MC MULLEN: Yes, and I said to the Court that on the first page of the rough draft of my report of interview was a strike out, which should be considered an original note because I struck it out at the time I interviewed the witness on the phone. There are three other pages attached to that which are not original notes, but they have been marked for the Court.

If the Court wants me to turn them over, I will.

THE COURT: Yes, I think that would be best.

AGENT MC MULLEN: This is an unusual circumstance, your Honor. My stenographer works in Babylon, New York. We had those notes typewritten. There are typographical errors. It is definitely not a finished product.

THE COURT: They are not in the shape that you would normally require them to be?

AGENT MC MULLEN: That is correct.

There are some pencil notations on there.

With that understanding, I will turn them over.

THE COURT: This would have been a first typed draft as it turned out?

AGENT MC MULLEN: Yes.

MR. FISCHETTI: I have one request, that is with regards to the testimony of Allen Goberman.

May I ask that he be excused from the courtroom?

THE COURT: Would you please step out?

(Mr. Goberman leaves courtroom.)

MR. FISCHETTI: That is a general demand under Brady versus Maryland, in view of his testimony with regard to the identification of John DeLiso in an interview with Agent McMullen on October 13, 1972, wherein the 302 which I have indicates that Mr. Goberman picked out a picture of John DeLiso, and said that was the man standing outside the door.

I make demand now on Mr. Ritchie and the Government,

Is there any information that the Government now has, whether reported or not, at any interview of Allen Goberman, most likely the last time, when Mr. Ritchie says he saw him with Agent McMullen -- I do not know when that was, or how long -- whether he has any information, or whether Agent McMullen has, that Allen Goberman said at that time that John DeLiso, or the picture identified, was the man outside the room, or any other Brady material that comes out of that meeting.

MR. RITCHIE: Mr. Goberman has been certain of the identification of Rocco Merolla ever since he first saw a photograph of Rocco Merolla, which resolved some contradictions in his testimony, and produced others.

All the material has been turned over to Mr. Fischetti during his last interview.

We really didn't get to discuss his testimony in too great detail. We sort of discussed the merits of the case in general. We didn't get too specific. He didn't wish to read his testimony. He thought he was up on it. He didn't want to confuse himself. His wife had pointed out some things in the testimony to him where he was obviously incorrect, but he didn't think he was.

I can state that nothing new was learned in his last interview, and there were no basic contradictions.

MR. FISCHETTI: Not to belabor the point, I hope

your Honor will try to understand the problem --

THE COURT: I think what we are all talking about, should there be a verdict against Mr. DeLiso, we'd just as soon not have the Brady discovery after a verdict.

MR. RITCHIE: Your Honor, there is no written material, and to my recollection there is no --

THE COURT: The next form of the question is:

How about the clear or unclear recollection of Mr. McMullen?

MR. RITCHIE: So far as I know --

THE COURT: You see, after that darned case, it has to be a little more than just being pretty sure about it.

What he is really saying is:

Look, is it all? Is the story of what Mr. Allen Goberman has disclosed to you all squared away now, or if you have to discuss this with your wife or someone equally important, would you remember other things about the unreliability of him, and how he kept changing back and forth, et cetera, et cetera. I think that is the kind of thing that they are after.

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MR. RITCHIE: No, your Honor, I can say that there was no contradiction, he was not shown photographs in any of the last two interviews.

THE COURT: As I understand it from what you had said, he identified in his earliest interview Mr. John DeLiso as the man who accompanied him to the corridor, but that on the first occasion on which a picture of Rocco Merolla was exhibited to him, he changed his testimony, or corrected it himself, call it what you will, and from there on out, said that that was the Rocco who took him out.

MR. FISCHETTI: Correct, and I would like to know if that is the fact.

MR. RITCHIE: Your Honor, he was never shown a photograph of Rocco Merolla, it was on his trial testimony that he stated, I believe the first time, that the individual who accompanied him outside was Rocco Merolla.

THE COURT: Where is she, Ms. Seltzer?

MR. LEONE: Here she is (indicating).

THE COURT: You see, before the Grand Jury, the Government people weren't asking along that line, and all what you wish to present to the Grand Jury was the presence among the Conspirators of the gun that went physically from hand to hand.

MR. RITCHIE: Yes, your Honor.

THE COURT: It could have been Thomas, it could have been John, it could have been a Merolla, or a pair of Merollas, DeLiso, anybody, it wasn't specific --

MR. RITCHIE: Yes, your Honor.

THE COURT: That is why I thought I could not authorize you to ask the question in the form you wanted to.

I think now what we are after is from the Brady point of view to make sure that there isn't anything in the differences in this Allen Goberman testimony on the point that is not now known to counsel.

MR. RITCHIE: No, there isn't, your Honor.

MS. SELTZER: Your Honor --

MR. FISCHETTI: Let me finish my point if I can.

THE COURT: What is your point?

MR. FISCHETTI: My point is, Judge, so the record is perfectly clear, that the Government must have been aware that Allen Goberman identified, and we had a Wade hearing on this, John DeLiso.

THE COURT: Let me ask you one thing here. I forget, but let me see, whose witness was Allen Goberman, yours or Mr. Pollack's?

MR. RITCHIE: He was Mr. Pollack's the last time.

THE COURT: Were you surprised when he identified Rocco Merolla?

MR. RITCHIE: Your Honor, I don't really recall, all I recall is the fact that there was the testimony, and I know that it resolved certain contradictions in the testimony, and then it produced other contradictions with respect to his prior inconsistent statement, resolving conflicts between him and Harold Goberman.

THE COURT: The 302 statement to McMullen was in court last time?

MR. FISCHETTI: Oh, yes.

THE COURT: And known to you?

MR. FISCHETTI: Yes.

THE COURT: That is how I knew about it.

MR. FISCHETTI: That is right.

THE COURT: Because it had been in the 3500 Material, and was subject to cross-examination.

MR. FISCHETTI: No question.

Well, to a limited extent, I represented Mr. DeLiso, and I didn't go into it at that point for other reasons.

THE COURT: You were not anxious.

MR. FISCHETTI: That is right, but now, sir, we have a second trial, where this is known by the Government, it is the Government's witness, I am in possession of the 302 which says that for the first time he identified DeLiso, and is now permitted to take the stand and

put DeLiso in the room, not outside the room, and now I am demanding, under Brady, whether or not Mr. McMullen ever asked him who was in the room, who was outside of the room, were you wrong when you said DeLiso the first time, and I think I am entitled to know that.

THE COURT: Let me ask you, Mr. McMullen, were you rather surprised at that point? Can you remember?

MR. MC MULLEN: I never asked him about his testimony after he got off the stand.

THE COURT: No, when he testified at the trial, were you somewhat surprised when he said Rocco Merolla rather than John DeLiso?

MR. MC MULLEN: Yes, I would have to say I was.

I don't actually recall if I was in the courtroom when he made that mis-identification, I know I wasn't in the courtroom the first time.

I believe I was surprised, I believe I would have to say I was surprised.

THE COURT: In other words, you were surprised when you were either told about it or heard about it?

MR. MC MULLEN: Yes, I was surprised.

THE COURT: And it was surfaced then, can you remember?

MR. RITCHIE: Well, I can reconstruct it, your Honor, he was shown a photograph once --

MR. FISCHETTI: Of whom?

MR. RITCHIE: Of John DeLiso, okay, and he at that time identified John DeLiso as having been the individual given the gun -- No, no, as being the individual outside in the hall.

Now, he was never shown a photograph again to prevent, you know, the suggestivity, he wasn't shown the picture again, and he didn't know names, and when he took the stand, it had to come as a surprise to myself and Mr. Pollack, because Rocco Merolla came in from out of the blue.

MR. FISCHETTI: He didn't say his name, he pointed him out in the courtroom, names had nothing to do with it, Mr. Ritchie.

THE COURT: Yes, that is right, that is right.

You see, his testimony beforehand had been so vague on all the other points that I suppose there wasn't much you could do about anything except the one that he was wrong about at the time, or at least at which there had been a change, and you were under wraps, and accordingly, there was the problem on trying to get him from the frying pan right into the fire.

MR. FISCHETTI: I am afraid now that the jury is left with the impression that maybe he identified the picture, and maybe the picture wasn't DeLiso, and that is

why I had some difficulty trying to tie in with the witness on the basis of Agent McMullen's report that picture, and that they were one and the same, and that is why I asked him to refer to Mr. DeLiso by name.

Now I'm going to attempt to get out through Agent McMullen, and I don't mind disclosing that the picture he did identify was the picture of John DeLiso, and Mr. McMullen has testified to that already.

MR. RITCHIE: And we have already had the representation.

THE COURT: The trouble with Mr. McMullen is that every time you Swear him in he tells the truth.

MR. FISCHETTI: That is my trouble with most Agents, your Honor.

MR. MC MULLEN: Thank you, your Honor.

MR. FISCHETTI: But your Honor can understand the nature of my motion now before the Court under Brady, which is, Is there anything that Mr. Ritchie and Mr. McMullen and Miss Katz know?

THE COURT: Give him overnight to think about it. The answer is now No, and say no more.

MR. FISCHETTI: I accept.

THE COURT: If I hadn't heard Allen Goberman's testimony twice, I would have been more surprised than I am now.

MS. SELTZER: I would make a similar request as made by Mr. Fischetti that at the first trial the testimony was of the Government that the gun went into the holster of Mr. DeLiso, now the holster is had by Mr. Merolla, and the reason I didn't cross-examine is that I --

THE COURT: It would be just as bad either way.

MS. SELTZER: That is correct.

The problem is that this man has problems with identifying anyone and getting anyone straight, and that if there is any more evidence indicating his confused mind, I think it would be very relevant to us, so I would just join in Mr. Fischetti's request.

MR. RITCHIE: I assume every counsel joins in that.

THE COURT: Thank you, Folks.

(At ten minutes past 5:00, the session was closed.)

* * *

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

-against- :

73-CR-442

JOHN DE LISO, THOMAS MCNAMARA, ALPHONSE MEROLLA and ALPHONSE M. MEROLLA, :

Defendants. :

----------x

United States Courthouse
Brooklyn, New York

October 17, 1974
10:00 o'clock A.M.

B e f o r e :

HONORABLE JOHN F. DOOLING, JR., U.S.D.J.

EMANUEL KARR
OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: DAVID RITCHIE, ESQ.
-and-
MARSHA KATZ, ESQ.
Special Attorneys, Task Force

RONALD FISCHETTI, ESQ.
Attorney for Defendant DeLiso

LEONARD J. MEISELMAN, ESQ.
-and-
MICHAEL GILLEN, ESQ.
Attorneys for Defendant Thomas McNamara

MS. MARION SELTZER
LEGAL AID SOCIETY
Attorney for Defendant A.M. Merolla

JOHN LEONE, ESQ.
Attorney for Defendant A. Merolla

Also present:

RICHARD MC MULLEN
Special Agent, FBI

Kerr/tr
T1/R1

(At 10:10 p.m. the jury took its place in the jury box.)

MR. RITCHIE: Your Honor, May we have a side bar?

THE COURT: Yes.

(The following occurred without the hearing of the jury.)

MR. RITCHIE: My first witness of the day was to be Timothy Shea, your Honor, and he is apparently a little late. I told him to be here at 10:00.

THE COURT: Can't you stick someone else in?

MR. RITCHIE: I had told everybody else to be here around 11:00 because the cross-examination is going to take at least an hour.

MR. MEISELMAN: Your Honor, while we are at the bar, my memory does not serve me right as to the discussion and rulings by your Honor with respect to the objection concerning Mr. Shea on confidentiality of communication and --

MR. RITCHIE: Your Honor, I will put Agent McMullen on now so we can proceed.

THE COURT: Okay.

MR. MEISELMAN: -- and rather than to ask for another side bar when Mr. Shea comes in, may we just

have your Honor's ruling now with respect to that?

THE COURT: It is privileged matter, if it is privileged --

MR. MEISELMAN: Then when I object may the objection known that I will be doing it on that basis mostly.

THE COURT: I am sure Mr. Ritchie won't ask any questions that will require a privileged objection.

MR. RITCHIE: I will not, I am sticking pretty much to the line of questioning of last time.

THE COURT: That is those that were allowed.

MR. RITCHIE: Yes, your Honor, I am not going to go beyond that.

I will put on Agent McMullen at this time, your Honor.

Your Honor, I have turned over the principal 302 which is involved, and that is the 302 on 3/15.

If your Honor gives me a chance to do it outside of the presence of the jury, I will turn over the remaining 302's.

THE COURT: Okay.

MR. RITCHIE: Actually the primary problem we have, your Honor, is the prior stipulation between Mr. Fischetti and the Government last time with

respect to Alphonse M. Merolla, which would now be a stipulation between Ms. Seltzer and the Government with respect to a particular card that is involved.

MR. FISCHETTI: May I bring Ms. Seltzer up to date, maybe if she listens perhaps she will remember from the record.

At the time of Alphonse Merolla's arrest, your Honor, Agent McMullen was prepared to testify from his 302s that at that time he took or Mr. Merolla rather gave him a card bearing the name and telephone number of Harold Goberman.

On that card there was also other names, nicknames and numbers which have no relevancy to this case.

I therefore objected to the card itself going into evidence, there was no way to either exercise or cover up all the other numbers, and so to obviate that difficulty Mr. Pollack and I agreed that we would enter into a stiuplation that there was a card and that the card did have Harry Goberman's name and number on it, that is for purposes of Mr. McMullen's testimony, and we would face the problem of what to do with the jury if the jury asked for that card at the time when they were deliberating, and that was the

stipulation.

Of course, Mr. Merolla is no longer my client and is Ms. Seltzer's.

THE COURT: Okay.

MR. RITCHIE: Your Honor, and the other thing is that I will turn over the 302s and any other 302 material at the close of his examination so that we can continue at the present time.

MR. GILLEN: Do you have any of this on the woman, Helen Goberman?

I think you said that there was an interview with her?

MR. RITCHIE: I will discuss that at a later time, we will take care of it.

THE COURT: I want to start now or do you want to do the other thing now?

MR. RITCHIE: Oh, we will go on with this now and at a break I will turn over the 302s.

MR. LEONE: How about the 3500 material we are supposed to get?

THE COURT: He said at the first break.

(The trial then continued within the hearing of the jury.)

MR. RITCHIE: The Government calls Mr.

Richard McMullen.

THE COURT: Will you stop there, Mr. McMullen?

R I C H A R D Mc M U L L E N, called as a witness on behalf of the Government, having been duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION BY

MR. RITCHIE:

Q Mr. McMullen, you are a special agent of the Federal Bureau of Investigations, is that not correct?

A That is correct.

Q A special agent just means that you are an agent of the Bureau; is that correct, sir?

A That is correct.

Q That is the title for any agent?

A That is correct.

Q How long have you been so employed?

A Approximately nine years and four months.

Q And where is your duty station at the present time?

A Well, technically I am assigned to the New York Office of the FBI and I conduct investigations out of the Babylon Resident Agency which is a suboffice and we have responsibility for investigations in Suffolk County, New York.

Q And how long have you been stationed at the Babylon office?

A In excess of two years.

Q Now, directing your attention to February of 1973, February 15, to be exact, did you have occasion to be in Brooklyn, New York on that date?

A Yes, I did.

Q And where were you on that date?

A I was in your office in this building or in the adjoining building.

Q And who if anyone else was present in my office at that time?

A Besides yourself, I was present, Mr. Thomas McNamara was present and two attorneys, one by the name of Timothy Shea and another attorney by the name of Raymond Bergen who at that time were representing Mr. McNamara.

Q And what was your purpose in being in my office on that date?

A The purpose of my being in your office on that date was to interview Mr. McNamara concerning the events involving this case.

Q And on that date what did you say to any of those individuals and what if anything did they say to you?

A Well, at the outset of the interview I

introduced myself to Mr. McNamara and his attorneys and I advised Mr. McNamara of his rights.

I advised him that he had a right to remain silent, that anything he said could be used in a court of law against him, that he had the right to consult an attorney before answering any questions, and that if he decided to answer any questions he had the right to stop answering those questions at anytime he so desired.

Q And did Mr. McNamara say anything to you?

A Yes, he acknowledged that he understood his right and he proceeded to tell us his side of the story, to a degree.

Q And do you know how this meeting came about, was it pursuant to subpoena or was it on the initiative of someone other than the Government?

A A week or two prior to this interview, I had an interview with Mr. McNamara's attorney in your office in the adjoining building, and at the conclusion of that meeting it was agreed that Mr. McNamara would come in voluntarily and give us a statement.

Q Now, on that date, February 15, 1973, how long did the meeting take, approximately?

A Approximately five and a half to six hours.

EK:MM
T1R2

Q And during the course of this meeting, did you take any notes?

A Yes, sir, I did.

Q And you did reduce them to a typewritten statement; have you not?

A Yes, I have.

Q And during the course of these conversations with Mr. McNamara, did he discuss any threats made upon his life or physcial safety by Mr. Harold Goberman?

A Yes, he did.

Q Now, do you have in front of you any notes?

A Yes, sir, I do.

Q And are some of them handwritten notes?

A Yes, sir, they are.

Q And can you tell the Jury how those notes were made up?

A Yes.

My report of interview of Mr. McNamara is approximately thirteen and a half pages long, approximately 4,000 words. I -- I have reviewed my report of the interview and made an outline, and these (indicating) handwritten pages that I have before me is that outline ofmy report of interview.

Q Do you intend to use that outline to refresh your recollection as to specific statements made by Mr. McNamara?

A Yes, I do.

Q Now, directing your attention to your earlier statement that Mr. McNamara related to you threats by Harold Goberman, would you recount for the ladies and gentlemen of the Jury what Mr. McNamara did tell you on February 15, with respect to threats by Mr. Goberman?

A Yes.

Mr. McNamara told me of approximately eleven threats of violence which Harold Goberman uttered to Mr. McNamara during the course of their association. The first threat of violence that Mr. McNamara related to me he said occurred on April 27, 1972, at which time he had engaged Harold Goberman in a conversation and during the course of his conversation Harold Goberman demanded $3,400 from Mr. McNamara.

This conversation took place in the construction trailer on the job site of the new building, the McNamara Buick Pontiac on Nesconsit Highway in Port Jefferson. During the course of this conversation, Mr. McNamara stated that he wasn't going to give Harold Goberman this $3,400 that he had demanded, and Harold Goberman became angry and picked up a steel pick and threatened Mr. McNamara with the pick.

Mr. McNamara claims on this occasion that he pushed Harry Goberman away with his foot and left the trailer.

Q Did Mr. McNamara set a date on this incident?

THE COURT: Yes, he has already testified, April 27th --

MR. RITCHIE: I'm sorry.

THE COURT: (Continuing) -- 1972.

MR. RITCHIE: I am sorry.

THE COURT: In the trailer.

BY MR. RITCHIE:

Q And what if anything did Mr. McNamara say next?

A The next threat of violence which he told me about he said occurred somewhere around April 27th, 28th or 29th of 1972, and it was around this time that Mr. McNamara began to notice a car parked at the curb at the job site. and it was around this time that Harry Goberman demanded $12,000 from Mr. McNamara. Mr. McNamara said that Harry Goberman made reference to the individual seated in the car and said that this fellow would firebomb Mr. McNamara's home and kill Mr. McNamara.

Q Did Mr.McNamara state whether he did in fact give any money to Harold Goberman after this conversation?

A Yes, sir, he did, he said that on May 18, 1972, $12,000 was given by him, McNamara, to Harry Goberman, and at this point Mr. McNamara was asked, "Well, had you discussed the threats of violence with your attoneys?"

And Mr. McNamara said, no, he did not.

Mr. McNamara related another threat which he said occurred on April 27, 1972, in which he had engaged Mr. Goberman in a heated argument, and during this time Harry Goberman told Mr.McNamara that he was going to take $200,000 fromthe second requisition and blow town, and Mr. McNamara said thaton this occasion Harry Goberman called all the sub-contractors for the job and told them to deliver the goods or materials ordered for the job to the job site so it would be accessable to pilferage by thieves.

It was around this occasion, on this occasion that Harry Goberman pointed to two individuals on the job and told Mr. McNamara that these two fellows would do away with Mr. McNamara.

There was another threat, date of which was not mentioned, which concerned the installation of exhause fans in the building. Mr. McNamara stated that the exhaust fans were put in backwards and encased in concrete, and when he told Harold Goberman that these were put in incorrectly, he demanded that Harry Goberman rectify the situation. On this occasion Mr. McNamara stated that Harold Goberman refused to rectify the situation, and he kicked, hit Thomas McNamara and Thomas McNamara ran away from the scene.

Another threat, the time again was not specified, occurred when Harold Goberman was on the roof of the new

building and Mr. McNamara came up on the roof and complained to Harold Goberman that the roof had a sag in it and demanded that Harold Goberman rectify that situation, and Harold Goberman when Mr. McNamara pointed to it, refused and told Mr. McNamara he would throw him off the roof if Mr. McNamara did not leave at that instant.

Another threat of violence Mr. McNamara claims was added to him by Harold Goberman -- not a threat of violence, it wasn't a threat, but on another occasion there was concrete poured on the job and Mr. McNamara claims that the concrete was watery and he wanted Harold Goberman to have the concrete shovelled out, and at this time Harold Goberman refused and he spit in Mr.McNamara's face.

Mr. McNamara told me that the All-American Carting Company had delivered or placed on the job site a refuse container, and without Mr.McNamara's permission, and Harold Goberman approached Mr. McNamara and said to Mr. McNamara that Harold Goberman had gotten $350 for this contract and that Mr. McNamara would have to pay a rental fee of $125 per week.

Mr. McNamara stated that he told Harold Goberman that he would refuse to take this rental, and he said that it was around this time that there were two strangers on the job site and Mr. McNamara asked who these two strangers were, and Harold Goberman told Mr. McNamara that if he didn't pay

the $125 per week that these two strangers would kill Mr. McNamara, and on this occasion Mr. McNamara said he ran away from Harold Goberman.

Mr. McNamara related another threat of violence. Mr. McNamara stated that in the automobile business when you build a showroom facility you must have an oil waste tank installed near the service area.

On this particular job, Mr. McNamara stated, that they were installing a thousand-gallon waste tank, and Mr. McNamara stated that he had the tank installed --

R3 fls

(Continued on next page.)

EK:MM
T1R3

Q When you say "install" is that above the ground?

A No, Mr. McNamara stated that the usual procedure for installing such an oil waste tank was to dig a hole and bury it, and Mr. McNamara had this tank installed in the ground.

He claims that Harold Goberman when he found out that this oil waste tank had beeninstalled he came enraged because he was deprived of the installation fee for this particular installation.

Mr.McNamara stated that Harry Goberman threatened to crush theoil tank and bury Mr. McNamara in the ground.

On another occasion, time not specified by Mr. McNamara, Mr. McNamara stated that Harry Goberman threatened to destroy the new building with a DC7 Bulldozer or a tractor and as a result of this Mr. McNamara claims that he hired a night watchman by the names of James Friter and gave this night watchman a shotgun to protect the premises.

Mr. McNamara said on one occasion Mr. Friter was assaulted in that someone tried to run him down with an automobile --

Q Did he specify who the individual was?

A No, no, Mr. McNamara could not provide any information indicating the identity of the driver of the car, nor could he provide any information indicating that this was

associated with Harry Goberman.

On another occasion, Mr.McNamara said that an electrical cable which was in the ground was broken or severed and he demanded that Harold Goberman pay for the repair of this cable. Harold Goberman refused, according to Mr. McNamara and told Mr. McNamara that he was going to dig a ditch and bury Thomas McNamara.

That was the last threat of violence Mr. McNamara told us about.

Q Did Mr. McNamara tell you anything about phone calls he was receiving at home?

A Yes.

Mr. McNamara stated that during the course of these events the phone in his home awas being rung, and when someone answered the phone there would be no voice onthe other side, but they could hear breathing. There were no words uttered by this party who was making the telephone call.

Mr. McNamara stated that he advised a detective by the name of Thomas Gill of these phone calls.

Q Now, did Mr. McNamara, was Mr. McNamara able to attribute the heavy breathing to any particular individual?

A No, sir, he offered no information and stated that he did not know who was making the telephone calls at all.

Q But he did relate that in the course of conversation

about the threats by Harold Goberman, did he not?

A Yes, sir, he did.

Q Now, during the course of this interview, you were speaking to Mr. McNamara as an investigator; were you not?

A Yes, sir, I was.

Q And did you speak to him in terms of ascertainin whether any of these allegations could be corroborated?

A Yes, sir, several times during the course of the interview I asked Mr. McNamara, "Did you know the identiti

"Were there any witnesses"?

"Did you ever discuss this with your attorneys?"

And he said no on each occasion that I asked him

MP fls

(Continued on next page.)

MP:jm
T2amR1

Q At that time, did he not mention the name of James Freda?

A Yes, sir.

Q What did he say James Freda could corroborate, if anything?

A I believe the fact someone tried to run him down with a car.

Q What was the date of the first threat Mr. McNamara told you --

A April 27, 1972.

Q Did Mr. McNamara make any statement as to whom he had told of the threat?

A Yes.

Q What did Mr. McNamara say to you with respect to that?

A Mr. McNamara stated that he told a detective by the name of Thomas Gill of the threats and he said that he was amused, he received no help from the Suffolk County Police Department nor did he receive any help from the Suffolk County District Attorney's Office after he had gone to them and told them all about Harry Goberman.

Q Did Mr. McNamara say that he told Thomas Gill of the threats or at least of the telephone calls that he had been receiving?

A I believe the telephone calls.

Q Did you, at any time, mention an attorney by the name of Desmond O'Sullivan?

A Yes.

Q What did he say with respect to Desmond O'Sullivan?

A He said that he had hired Desmond O'Sullivan to represent him in his dealings with Harold Goberman. And there was a meeting during which Desmond O'Sullivan was told of the threats of violence of Harry Goberman to Mr. McNamara.

As a result of this meeting, Desmond O'Sullivan contacted John Erlich who is in charge of the Suffolk County District Attorney's Fraud Bureau, and a meeting was arranged with John Erlich and another detective.

During this meeting, John Erlich was told of the threats of violence to Mr. McNamara.

Q Did you question Mr. Thomas McNamara as to whether he informed his eldest son of these threats?

A Yes, I believe I did.

Q Who is his eldest son?

A John McNamara.

Q His eldest son?

A I'm sorry, Thomas McNamara. If that is the person you are referring to. I asked Mr. McNamara at the

time of this interview -- I knew that Thomas McNamara, Junior was the acting United States Attorney --

THE COURT: Thomas McNamara, Junior?

THE WITNESS: Yes, was the acting United States Attorney,I believe, in the Eastern District of North Carolina. I asked Mr. McNamara --

BY MR. RITCHIE:

Q Excuse me. That is a position associated with the United States Government, is it not?

A Yes.

Q A prosecutor's position?

A Yes, tantamount to the District Attorney's Office in the state system. I asked Mr. McNamara if he had ever contacted his son Thomas McNamara and told him about all these problems he was having with Harold Goberman.

Q All these problems, or problem?

A The threats of violence, everything. If he discussed it with his son, Thomas, at all. He said no.

Q Directing your attention to April of 1973, did you have occasion during that month to swear out an affidavit for a search warrant before the magistrate in this courthouse?

A Yes, sir, I did have occasion to do that.

Q You swore as the deponent on that affidavit?

A Yes, I was the deponent.

Q And concerning what premises was the search warrant issued?

A The search warrant was sworn on that day -- was issued for the premises of McNamara Buick-Pontiac.

Q Specifically --

A I believe McNamara re New Cars, Incorporated.

Q Was it the file cabinets in the office?

A Yes, it was the file cabinet in Mr. McNamara's office.

Q Prior to swearing out this search warrant affidavit, had you served a subpoena on McNamara New Cars, Incorporated?

A Yes.

Q The custodian of the records of that?

A Yes.

Q And, what was that subpoena for? Was it for records concerning the cost of construction?

A Yes.

Q Were certain records produced?

A I believe some records were produced, that is correct.

Q That was pursuant to a subpoena?

A Yes.

Q Now, if you know, would the contract release

and the receipt -- well, the contract receipt --

THE COURT: You should identify them by exhibit number if you will, Mr. Ritchie.

MR. RITCHIE: Yes, your Honor.

I am sorry.

(Pause.)

THE COURT: I think 16 and 17.

MR. RITCHIE: Sixteen is the release, your Honor?

THE CLERK: Yes.

THE COURT: And 17 I believe is the receipt.

THE CLERK: That is right.

BY MR. RITCHIE:

Q Specifically, was Government's Exhibit 16 in evidence submitted pursuant to that subpoena?

A No, sir, it was not.

Q That is the contract release, June 28, 1972?

A That is correct.

Q Now, directing your attention to the search warrant for the offices of Thomas McNamara, was that in the old Buick-Pontiac showroom or was it in another building, if so, which building?

A The offices of Thomas McNamara were located at the time of the search warrant in the new car facilities for McNamara Buick-Pontiac, Incorporated on Route 374 in Port

Jefferson.

Q That is the new showroom that was built?

A That is correct.

Q The one Harry Goberman contracted with Mr. McNamara?

A Yes.

Q On that occasion you executed the search warrant, did you allow the corporation or anyone from the corporation to call any attorney?

A Yes. When I arrived on the premises to conduct the search I was with another agent by the name of William J. Quinn who assisted me in the search.

I introduced myself to Thomas McNamara, again, and allowed him the courtesy of calling his attorney and told him that technically we did not have to wait for his attorney to arrive, but in this case we would wait if he wanted to have his attorney present during the conducting of the search.

Q Did an attorney eventually come?

A Yes. We waited approximately forty minutes and Mr. McNamara's attorney, Timothy Shea, arrived on the scene. We displayed the search warrant to him, and were shown to Mr. McNamara's office and we conducted that search.

Q Prior to your conducting the search, did you have a conversation with Mr. Shea as to what you were looking

for?

A Well, we --

MR. MEISELMAN: I object.

THE COURT: I am sorry, I didn't quite get the question. Will you please read it?

(Whereupon, the last question was read by the reporter.)

THE COURT: First answer yes or no, Mr. McMullen. Did you tell Mr. Shea what you were looking for at the initiation of the search?

BY MR. RITCHIE:

Q Yes or no?

A I honestly don't recall if I told him prior to conducting the search. I showed him the search warrant.

Q Did you have a conversation with him about the search warrant?

A I certainly did.

Q What, if anything, did you say to him and what did he say to you?

MR. MEISELMAN: Your Honor --

THE COURT: I am sorry?

MR. LEONE: There is an objection to the conversation.

THE COURT: You mean on the hearsay ground?

MR. MEISELMAN: Yes.

THE COURT: This is received for the purpose of enabling the jury to determine from what was said whether or not the object of the search was made clear to the man whom Mr. Thomas McNamara had called to advise with him on that occasion.

THE WITNESS: During the course of the search, I left the offices of Thomas McNamara to use the telephone. I was followed out of the office by the attorney, Timothy Shea, and in a corridor, or narrow hallway, he said to me, "I know what you are looking for, the contract. It is not in existence."

THE COURT: It is not --

THE WITNESS: Not in existence. "You won't find it. Continue to look if you want to."

BY MR. RITCHIE:

Q Subsequent to that conversation, did you continue the search?

A Yes, sir, I did.

Q Did you search the entire premises as allowed by the affidavit and the warrant?

A I searched the offices of Thomas McNamara, the file cabinets, every document that was in there.

Q Did you find Government's Exhibit 16 in its

original form or a copy?

THE COURT: Government's Exhibit 16 or any copy of the original thereof?

MR. RITCHIE: Yes, your Honor.

A No, I did not find that document.

Q Now, sir, directing your attention to May 8th, 1973, did you have occasion on that date to see Mr. Alphonse M. Merolla?

A Yes.

THE COURT: What was that date?

MR. RITCHIE: May 8th, 1973, your Honor.

THE COURT: '73?

MR. RITCHIE: '73.

A Yes, I did.

Q Did you see him in this building?

A Yes, sir, I did.

Q You saw him in my office, did you not?

A That is correct.

Q Now, while you were present in that office, was there any conversation between myself and Mr. Alphonse M. Merolla?

A Yes, there was.

Q Did you hear that conversation?

A Yes.

McMullen-direct

Q You were in the room with myself and Mr. Merolla, is that not correct?

A Yes.

Q Did I ask Mr. Merolla at that time any questions?

A Yes.

Q Was one of the questions I asked concerning Harold Goberman?

A Yes.

Q Did I ask him whether or not --

MR. GILLEN: Objection, your Honor.

THE COURT: What is the purpose of this?

MR. RITCHIE: The purpose of this is to --

MR. LEONE: Judge, please, may we have this at side bar?

(The following took place at side bar.)

MR. LEONE: May I say first that he never asked him if he was advised of his rights. We don't know what is going off here. He is leading the witness --

THE COURT: He is not leading him by giving him the content of the conversation.

MR. GILLEN: But that's why we objected.

THE COURT: His question does not tender to Mr. McMullen --

MR. LEONE: I don't know what it's doing.

11

THE COURT: That should be the first thing said, he advised him of his rights.

MR. RITCHIE: I will go back over that. He was advised of his rights. Miss Seltzer -- Mr. Fischetti was supplied this on the occasion of the first trial as a 16-A --

THE COURT: I'm sorry?

MS. SELTZER: I don't know what you are talking about.

MR. RITCHIE: There has been turned over some 16-A material.

MS. SELTZER: I assume the only statement you are trying to elicit is whether Agent McMullen asked whether he knows Harold Goberman.

MR. RITCHIE: That is correct. Goberman.

MS. SELTZER: Is there anything else I haven't been given notice of --

MR. RITCHIE: I don't plan to elicit anything else.

THE COURT: The card?

MR. RITCHIE: I beg your pardon?

THE COURT: The card.

MR. RITCHIE: We are going to do that by stipulation. I don't know, I haven't read it in the

transcript, but I will be careful.

THE COURT: I mean as part of this conversation.

MR. RITCHIE: Yes, your Honor.

MS. SELTZER: Wasn't the card seized at the time of the arrest?

MR. RITCHIE: That is correct.

MS. SELTZER: Wasn't that the same time of the conversation?

MR. RITCHIE: This was the same time.

MS. SELTZER: Was it the same day?

THE COURT: The card was produced at this meeting?

MR. RITCHIE: The meeting at the time of the arrest on a bench warrant in connection with this indictment.

THE COURT: Is that when the meeting occurred, at the time of the arrest?

MR. RITCHIE: Yes.

MR. GILLEN: He had been under arrest and was searched and a card with Harold Goberman's name was taken from his person. He was allegedly asked, do you know him, and he allegedly said no. At the last trial there was cross-examination because the name asked was Harold Gobman. Mr. Ritchie's pronounciation sometimes

13 is --

MR. FISCHETTI: In that regard, it was my cross-examination. I am sure Mr. Ritchie read it. Agent McMullen is aware of the cross-examination. I believe Mr. Pollack had this witness the last time.

MR. RITCHIE: That is correct.

MR. FISCHETTI: I don't represent Alphonse Merolla, but I strenuously object to Mr. Ritchie saying: didn't I ask, because he is --

THE COURT: Wait a second.

MR. FISCHETTI: I believe he is putting his credibility before the jury.

MR. RITCHIE: I would like Miss Katz to handle the next few questions to get over the problems.

THE COURT: I don't really that would help.

MS. SELTZER: The problem exists here is Alphonse Merolla did not hear this was the question that was used. He understood do you know Harold Gobaman --

MR. RITCHIE: That is summation material. That is cross-examination material.

THE COURT: Yes.

MS. SELTZER: But --

THE COURT: That is his assertion. And

Mr. McMullen was there and he said, "I asked him do you know Harold Goberman."

MR. FISCHETTI: That is the point. He didn't say that.

MS. SELTZER: He didn't say that.

MR. FISCHETTI: Mr. Ritchie was the interrogator. That's why I think it should be phrased "what was said."

THE COURT: All right. He was asked in the presence of Mr. McMullen, do you know Harold Goberman. And the witness' testimony will be yes, he was asked, and that he said he did not. Correct? Then somebody else will testify I guess that he said Harold Gobman-- that is the answer to the question to which he said no. Is that it?

MS. SELTZER: That's assuming Mr. Merolla will take the stand, which decision hasn't been reached yet.

THE COURT: He does not admit this ever occurred. You intend by cross-examination to show it didn't happen?

MS. SELTZER: We will try.

MR. GILLEN: The taking of an actual business card with the name Harold Goberman on it and asking the man if he had -- or he knew he had a card of Harold Goberman and do you know Harold Goberman, the danger

McMullen-direct

here is this man used the name Goberman, Gobman, and even when Mr. Ritchie says it himself, it's a question of enunciation. I thought Mr. Ritchie said Goldman before.

MR. RITCHIE: I thought it was quite clear myself. I may have a New York accent, but I don't have a bad one.

MR. MEISELMAN: Is there a bad New York accent?

THE COURT: Did you hear the Macy's ads on Columbus Day?

MR. MEISELMAN: Yes.

THE COURT: OK.

(continued on next page)

Picozzi
T2amR2
follows

MP:BD
2am2

McMullen-direct

(The following took place in open court.)

Q Now, Mr. McMullen, directing your attention to that conversation that you have been testifying about, was Mr. Merola asked at any time whether he knew any individuals --

THE COURT: I thought you were going to touch first on the question of how the whole conversation was initiated with any formality if any.

Q Prior to the initiation of this conversation with Mr. merolla, what if any advice was he given?

A He was advised of his rights. I would have to refresh my recollection from my report of interview who exactly advised him, either you or I. I believe it was you.

Q Would it be in here (indicating)?

THE COURT: He said he would have to look at the notes. We better have a short recess at this point, members of the jury. It's a little early for cigarettes. Please don't discuss the case amongst yourselves or with anyone not on the jury until it is given to you to decide.

(The jury left the courtroom.)

THE COURT: Did you find it, Mr. McMullen?

THE WITNESS: I will in a second.

MR. LEONE: You want us in the courtroom?

McMullen-direct

THE COURT: I take it you are interested in the 302. Are there copies of that available?

MR. RITCHIE: Not at the present time.

THE COURT: Do you want to make copies of it?

THE CLERK: Yes sir.

THE COURT: That is the only relevant one?

THE WITNESS: Yes sir.

MR. RITCHIE: Your Honor, I already turned over the 302 with respect to the interview of Thomas McNamara as 3500 material with respect to Mr. McMullen. I have not as yet turned over that last 302 that is being Xeroxed. I believe at the present time I should turn over as possible 3500 material with respect to Mr. McMullen certain 3500 material I was going to turn over with respect to Mr. Shea. That is -- I have it here.

MR. GILLEN: Which is the one being Xeroxed?

THE COURT: The one immediately relating to the present testimony as to who advised him of his rights.

MR. RITCHIE: Your Honor, I would ask a report of interview dated 4/20/73 by Richard McMullen and William Quinn, with respect to the search warrant and conversations with Mr. Shea previously marked

3500-16, now marked 3500 material with respect to Mr. McMullen. It would have been turned over with respect to Mr. Shea.

I don't know what number it will be but there is a number 29 on the next tag of the Clerk. I believe several were marked yesterday afternoon.

THE COURT: Mark it 29. If he has some others we can remark it. Mark it 29 and if there are others in between we can list them later.

THE CLERK: Marked as Government's Exhibit 3500-29.

MR. GILLEN: I will have one more question. There was a mention of an interview of Mr. McMullen that took place with one Helen Goberman. Are there any reports of interview with Helen Goberman?

THE COURT: That would be Brady and not 3500 material.

MR. GILLEN: I would like to know initially are there any such reports?

THE WITNESS: You are asking me?

THE COURT: I guess you are the only one that knows.

THE WITNESS: The interview, I think you are referring to, would have taken place last week.

MR. GILLEN: Is there any such report?

THE WITNESS: Which?

MR. GILLEN: Any reports.

THE WITNESS: At the time I talked to Allen Goberman, Helen Goberman was present and I don't consider that to be --

MR. GILLEN: Then there are no 302's of Helen Goberman?

THE WITNESS: No. There are no collective, joint interviews. The only name that appeared on the 302 was Allen Goberman.

MS. SELTZER: Didn't you say yesterday you had spoken to them last week?

MR. RITCHIE: Two weeks.

THE WITNESS: I interviewed Allen -- Mr. Ritchie interviewed Allen Goberman at his home prior to the trial.

MS. SELTZER: Were there any 302's from that?

THE COURT: Mr. Ritchie told you there was an interview --

MR. RITCHIE: It amounted to an interview with her. I was trying to interview Allen Goberman and Helen was present.

THE COURT: I think there was some suggestion

that she might be articulate.

MR. RITCHIE: Quite articulate.

THE COURT: The question is, was her articulation on any occasion incorporated in any 302 or other notes that you kept, Mr. McMullen?

THE WITNESS: No sir, I did not take notes.

THE COURT: Okay.

MR. RITCHIE: With respect to Brady material --

THE COURT: Thatis just more FBI chauvinism.

MR. LEONE: Is there any Brady material arising out of the interviews of the wife?

THE COURT: That's what we are asking.

MR. LEONE: That is the answer I want to hear.

MR. RITCHIE: As possible Brady material, and I wouldn't consider it such, but as long as the question is asked I will give everything I can, she doesn't like the brother-in-law Harold. She doesn't hate him any longer, she merely pities him. She thinks he is a terrible individual. She thinks the McNamaras are very good people and we are torturing them and persecuting them. Her husband Allen is mistaken in lots of testimony. She saw her brother-in-law Harold between 11:00 and 11:30 on the 28th.

THE COURT: When he went back presumably to

the Len-Al office?

MR. RITCHIE: Right. And he is probably one of the worst scoundrels in the world.

THE COURT: She saw him and never saw him in better health, shiny face and all?

MR. RITCHIE: No, she didn't go into that. What she did say was he had left to go to Brooklyn at 9:30 that morning to bid on a job and came back 11:00 or 11:15 and she knew he had never bid on the job. And he -- I think she was kind of evasive about what had been going on -- she said that she has a diary and when I asked her if I could see the diary she said no. So I can't supply any of that to defense counsel. I believe she stated she had been in contact with the defendants at least --

MR. LEONE: Did she say anything about how Mr. Goberman appeared on June 28th at the time she saw him to your knowledge, Mr. Ritchie?

MR. RITCHIE: I believe she might have said -- she said at some point, it wasn't clear, that he pulled up his leg on June 28th to show her marks but she didn't see any marks.

THE WITNESS: No, if I may correct Mr. Ritchie. She said that on June 28th she saw his leg and his

pants were above his knee and he had no marks on his leg. We asked how did you see his leg and she was evasive as to how she could see his leg or legs if he was wearing long trousers.

MR. RITCHIE: I belive at that point she stated he was always putting up his pants or something like that. She suggested some impropriety on the part of Harold Goberman at that time.

THE WITENSS: To which she advised his brother to change his attitude towards her.

MR. RITCHIE: SHe was very impressionistic in her rendition. She seemed to be relating her feelings rather than any specific facts except for the fact she had seen him at 11:15 in the morning.

THE COURT: She had seen him at 11:15 in the morning?

MR. RITCHIE: Yes. I think on Saturday, the last Saturday past, when I was interviewing Harold Goberman she said she might be off on the time, 11:00 or 11:30. Mistaken that Harold was in the police station -- mistaken that he had been in the police station at or between the hours of 11:00 and 11:30.

THE COURT: What did the police blotter say?

MR. RITCHIE: At the present time, I can't be

100 percent certain. I had the detective here yesterday and I was going to review the facts in the case with him. The detective was called on another subpoena in Suffolk County today involving his personal affairs. It appeared that we were going to at least Friday so I told him that he could come back on Friday. I will interview him with respect to this.

MR. LEONE: No reports were made up with respect to this interview?

MR. RITCHIE: Did you make up a report?

THE WITNESS: I didn't make any reports up.

MR. RITCHIE: I must say she is rather impressionistic and she said she would never testify for the Government.

MR. GILLEN: That is strange. I thought the Government has power of subpoena and nobody has a choice as to whether or not they weill testify.

THE COURT: I think perhaps you know that very well. And I knew it when I was a trial lawyer. I knew it very well. I can't recall when I called as a witness under subpoena anyone who said "I will never testify on your side of the case." I assumed I would be able to cross-examine in good season.

MR. RITCHIE: I might say that in her opinion her husband was wrong in a lot of his testimony. Saturday night I believe she said in eight specific places.

There is no report of interview that was done up. Apparently Mr. McMullen found her statement to be impressionistic --

MR. LEONE: Well, are there any other interviews that the agent thought were impressionistic? Now I'm getting curious.

THE COURT: Now, gentlemen. If you heard that Helen Goberman was willing to distribute her resume of the brother-in-law at the drop of a hat I am sure you would be in touch with her to see if she is a potential witness. I have enough respect for each of you to believe that there are any stones unturned.

MR. RITCHIE: Mrs. Goberman stated she had been subpoenaed by the defense in the first trial.

THE COURT: That is hearsay.

MR. LEONE: May we step out for two minutes?

THE CLERK: We assigned numbers 26, 27 and 28 to documents but we don't have them on the record yet.

MR. RITCHIE: Yes. They have been marked and I will have to check them out.

THE COURT: Which is that?

MR. RITCHIE: This is the material that Mr. Walsh had Xeroxed. It concerns the interview.

THE COURT: The lawyers have it now?

MR. RITCHIE: Yes. Can we have this marked as 3500-30. It has been turned over to defense counsel already.

THE CLERK: So marked.

MR. RITCHIE: One-page report of interview dated 5/8/73 with respect to the testimony of Richard McMullen regarding his interview in the offices of David J. Ritchie of Alphonse Merolla, caption in the case Alphonse M. Merolla.

THE COURT: That means A.M. and not A.L.?

MR. RITCHIE: Well, your Honor --

THE COURT: That means A. M. Merolla.

(A recess taken at this time.)

(Continued next page.)

EK fls

T3R1
EK:MM

(At 11:25 o'clock a.m. the Jury took its place in the Jurybox.)

CONTINUED DIRECT EXAMINATION

BY MR. RITCHIE:

Q Now, Mr. McMullen, prior to any conversation what if anything was said to Mr. Merolla with respect to his rights?

A Mr. Merolla was advised of his rights by you and explained in detail the charge against him.

Q And was he asked any questions concerning his knowledge of any individual?

A Yes, he was.

Q And who was he asked if he knew?

A Mr. Merolla was asked if he knew an individual by the name of Harry Goberman.

Mr. Merolla said, "No."

Q All right.

MR. RITCHIE: Your Honor, I believe we have a stipulation and I would just like to discuss the language of that at sidebar.

THE COURT: Suppose you talk to Ms. Seltzer about it.

MS. SELTZER: I am not sure what Mr. Ritchie wants.

THE COURT: Mr. Gillen?

CROSS-EXAMINATION

BY MR. GILLEN:

Q Mr. McMullen, my name is Michael Gillen, I am one of the attorneys representing Thomas McNamara.

You told us of an interview with him that took place onFebruary 15, 1973; is that correct?

A Yes, sir.

Q And how long did that interview take?

A How long?

Q Yes.

A Oh, between five and a half and I would say six and a half hours, somewhere around there.

Q Can you tell us the time, what time it started and what time it ended?

A Yes, sir, I think the appointment was for about 1:00 o'clock in the afternoon, I believe it started either at that time or shortly thereafter. It ended as I recall around 6:30, somewhere around there, sir.

Q Fairly late in the afternoon; correct?

A Yes, sir, that is correct.

Q Now, during that period of time of the interview did Thomas McNamara take ill at any time?

A I believe that during the time of the interview

THE COURT: Are you proposing it or looking for it?

(At this point Mr. Ritchie and Ms. Seltzer conferred.)

MR. RITCHIE: I believe we have it, your Honor. Your Honor, I have a stipulation for the Jury.

THE COURT: Very well.

MR. RITCHIE: The stipulation agreed to by and between the attorneys for the defendant Alphonse M. Merolla and the attorney for the Government is that on that date --

MS. SELTZER: Prior to his statement.

MR. RITCHIE: (Continuing) -- prior to the statement, there had been taken from -- there had been seized from Alphonse M. Merolla a card, a business card which on its reverse side bore a telephone number of Harold Goberman with that name next to it.

MS. SELTZER: So stipulated, your Honor.

THE COURT: Very well.

That means that no direct evidence of that will be produced before you but you can take that as an agreed fact.

MR. RITCHIE: Your Honor, I have no further questions at this time.

there was a short recess, I think Mr. McNamara excused himself and got a drink of water.

Q Did he take any medication, if you know?

A I am not sure, I have an impression that he did.

Q All right.

Now your role as an agent of the FBI is to search out facts; is that not so, sir?

A Yes, sir.

Q The FBI takes no side; is that not so?

A That is correct, sir.

Q And you reduce your report of the interviews with witnesses to writing; is that correct, sir?

A Of witnesses, yes, sir.

Q That is what is called a 302; is that right?

A Well, that is one of the functions of that document, a 302.

Q All right.

Now, you have been the case agent on this case since its inception, sir?

A That is correct.

Q And this investigation was first started sometime inthe latter part of 1972; is that correct?

A I believe August.

Q August?

A 1972.

Q All right.

And since that time you have been working on this case; correct?

A Yes, sir.

Q Now, do you have the report in front of you, Agent McMullen, as to Thomas McNamara and the threats?

A Yes, sir, I do.

Q Now, when you interview a witness or a party in a matter, do you take notes?

A Yes, sir, I do.

Q And the purpose of these notes is to refresh your recollection as to what was said?

A Well, the purpose of the notes are -- are to refresh my recollection as I dictate the report.

Q So the notes are -- well, all the pertinent factors will appear in your report; correct?

A Yes, sir.

Q And you make sure that all the pertinent factors appear in your report; correct?

A I try to, yes, sir.

Q And did you take notes during this five and a half, six hour interview on February 15, 1973, I believe it was, with Mr. McNamara?

A Yes, sir, I did.

Q May we have the notes?

A Those notes are no longer in existence, sir.

Q Well, the notes, what happened to them?

A The notes are used to dictate a report, they are reduced in writing and in a typewritten form and then afterwards they are discarded, after the typewritten form is produced or finished.

Q "Discarded" what do you mean by "discarded"?

A Destroyed, destroyed, discarded, burned or put through a shredder.

Q A paper shredder?

A Yes, sir, that is how we dispose of the garbage.

Q Is that the -- you mean an actual machine that shreds up papers?

A That is right, that is what I said, Mr. Gillen.

Q So that your notes aren't in this courtroom; is that right, sir?

A That is correct, sir.

Q Do you shred all your notes?

A Yes, sir, I shred all garbage.

Q Are notes garbage?

A Well, after they are used, they are -- er -- er-- you know, you don't need them so we shred them.

Q These are notes kept at the time or made at the time thatyou are interviewing someone: is that correct?

A That is correct, sir.

Q And you consider these garbage?

A No, I will take back the word "garbage," the notes are certainly not garbage. The notes are used to dictat a report and when they are no longer needed they are destroyed which isthe common practice inthe FBI.

Q You mean the whole FBI does this, shreds these notes?

A Well, I don't know whether they all shred them, we in our office have a shredder. The notes are discarded however the other offices destroy theres. You know, they are paper, it isn't any longer needed. Whether they are put through a shredder or they burn them or whether they throw them out, well --

Q Will you describe the shredder to this Jury.

THE COURT: Well --

MR. RITCHIE: Objection, your Honor.

THE COURT: I think many business offices have them, perhaps.

MR. GILLEN: I have an office and I don't have one, sir, and I haven't seen one in any business offic

MR. RITCHIE: I object, your Honor, --

THE COURT: That is quite enough, Mr. Gillen.

MR. RITCHIE: I object, your Honor, Mr. Gillen knows better than that.

BY MR. GILLEN:

Q You told us that Thomas McNamara told you that he informed Assistant District Attorney Erlich of these threats; is that right?

A Yes, sir, it is.

R 2 fls (Continued on next page.)

T3R2

Q And this is a relevant factor inthis case: isn't

A Yes, sir. a relevant factor.

Q Will you point out in this report where there appears that Thomas McNamara informed Mr. Erlich of these threats?

(The witness examined the document before him.)

Q Do you find it?

A Yes, sir.

Q What page is it on?

A Page 13, last paragraph.

Q Are the pages numbered, sir?

A Yes, sir, they should be if your copy is like mine.

THE COURT: It should be the last page, shouldn't it?

THE WITNESS: No, sir.

MR. GILLEN: I see.

THE WITNESS: You don't have the page?

THE COURT: Now please, Mr. Gillen.

MR. GILLEN: I haven't said a word.

THE COURT: Don't say it.

MR. GILLEN: I don't have the page.

THE WITNESS: No, sir, you don't.

THE COURT: If any of you have got the page?

THE WITNESS: It is my page marked number thirteen.

MR. GILLEN: Mr. Fischetti has it, your Honor.

(A document was handed to Mr. Gillen by Mr. Fischetti.)

Q Now, there did you not state that:

"McNamara stated he is amazed that the Suffolk County Police Department and the Suffolk County District Attorney's office did nothing to help him after he had gone to them and told them about Goberman."

Is that what you said?

A That is exactly what I said.

Q And he told you that when they went to Mr. Erlich, Mr. O'Sullivan, that they went there for the purpose of getting a fraud prosecution against Mr. Goberman?

A No, sir, he did not say that.

Q Did he tell you that the purpose of talking to Mr. Erlich --

Is it Erlich or Erlichman, Erlich --

A Mr. Erlich --

MR. RITCHIE: Objection, your Honor.

MR. GILLEN: I just wasn't sure, your Honor, of the name.

All right.

Q Now it says there Assitant District Attorney's Office, now when he went to the Assistant District Attorney didn't he tell youat that time that he went there because of and complained of kickbacks?

A I don't recall him saying that to me, sir.

Q Did you ever talk to Desmond O'Sullivan?

A Yes, sir, I did.

Q Did Mr. O'Sullivan tell you --

MR. RITCHIE: Objection as to whatever Mr. O'Sullivan said.

He has been a witness here, this is cross-examination concerning a conversation with Thomas McNamara, anything that Desmond O'Sullivan said should have been brought during his examination, and what O'Sullivan said is now hearsay.

MR. GILLEN: I am going on the one paragraph.

THE COURT: I'm sorry, sir.

MR. GILLEN: I'm going on the one paragraph as to whether this witness knew at the time he was speaking with Mr. McNamara or before he wrote this report knew that Mr. Erlich was from the fraud bureau and that Mr. Erlich was there investigating an alleged fraud.

THE COURT: You may ask that question.

MR. GILLEN: Do you know the question? Do you

have the question, Mr. McMullen?

THE WITNESS: No, I don't at this point.

THE COURT: Would you read it then, Mr. Karr?

(The following questionwas then read:

"I am going on the one paragraph as to whether this witness knew at the time he was speaking with Mr. McNamara or before he wrote this report knew that Mr. Erlich was from the fraud bureau and that Mr. Erlich was there investigating an alleged fraud."

A Well, I think there are two questions in that one.

THE COURT: Yes, that is right.

A And I will answer each question as I take it.

Q Now would you?

A Of course that Mr.Erlich is the chief assistant who was in charge of the fraud bureau. WE conduct daily business with the Suffolk County District Attorney's Office, we know who the chiefs are and what the chief assistants do.

I don't think prior to the date I had interviewed Desmond O'Sullivan I had talked to him about his meeting with Mr. Erlich.

I don't recall right now whether, whether he mentioned to me that the purpose of the meeting that he arranged with Mr. Erlich was to -- yes, all right, I do recall, I do

recall Mr. O'Sullivan telling me that he contacted Mr. Erlich because Mr.Erlich was his personal friend, Chief of the Fraud Bureau, and he wanted to come over and to see if there was violation of the state statutes.

Q Now, when did you interview Mr. O'Sullivan?

A I don't know the exact date off-hand, Mr. Gillen.

Q Well, I show you 35-27 and refer you to the date over here. (indicating)

Would that refresh your recollection?

A Yes, sir, it does.

THE COURT: Is that the interview date?

THE WITNESS: Yes, sir.

BY MR. GILLEN:

Q That would be the interview date?

A Yes.

He interviewed Desmond O'Sullivan six days after I interviewed Mr. McNamara.

Q And did you interview Mr. O'Sullivan before you dictated this report?

A This report?

Q Your report, 35 whatever.

THE COURT: The one on the McNamara interview?

MR. GILLEN: Yes, sir, yes, sir.

THE COURT: Was that dictated after youhad met with Mr.O'Sullivan?

THE WITNESS: No, sir, I believe my interview of Mr. O'Sullivan was in the afternoon and I dictated this report in the morning of the same date, which is February -- which is February 21, 1973.

Q Is there anything on there that indicates the time of day when you dictated this report, Agent McMullen?

A No, sir, but I have a recollection of appearing in Mr. O'Sullivan's office on my way home.

Q And this is in February, 1973?

A Yes, sir.

Q Excuse me.

(Mr. Gillen removed a document before the witness.)

Q Did you ever put in your report any place that Thomas McNamara told you that he had told Mr. Erlich of the threats?

A I did not use the name Erlich, I used the Suffolk County District Attorney's Office.

Q But these notes that have been destroyed, what did they say?

A Most likely said the District Attorney's Office.

Q You mean you don't recall now what your notes said at that time?

A No -- well, my notes have been reduced to a report and my notes must have said the District Attorney's Office. My notes mention the fact that there was a meeting with Mr. Erlich and Mr. McNamara made a statement, and that was the only statement that Mr. McNamara stated that at any time in the course of this interview that there was any conversation with Mr. Erlich, and he told me that he went to the Suffolk County District Attorney's Office and received no help and that he told Erlich about these threats.

Q That is what I'm saying, where in your report does it say that Mr. McNamara told Mr. Erlich of these threats?

A The words do not say in the report that Mr. McNamara told Erlich of the threats.

Q Was it in your notes?

A I don't know if it was in my notes, but I do have an independent recollection of him saying that because it was a very important point as far as I was concerned.

Q It was an important point: is that correct?

A That is correct, yes, sir.

Q Didn't you tell us before that all the important points are incarcerated in your report?

A No, I said before that I tried to incorporate all the important points in my notes during the five or six hour interview, I may not have written down every word that is

said but I do, I use my notes as an outline to dictate a report, and I do have an independent recollection because it was an important point and it was something that could be very easily verified as to whether he ever told Mr. Erlich about these threats, and when he said it it was, it was a salient impression on my mind.

Q Very important?

A Yes, sir, it was.

Q And very important enough to appear in your report, right?

A Well, it appears in my report withthis statement that he went to the Suffolk County District Attorney's Office and received no help.

R3 fls

(Continued on next page.)

EK:MM T3R3

Q Where in your report, sir, does it appear that Mr. McNamara told you that he told Mr. Erlich that he had been threatened?

A Again --

MR. RITCHIE: Objection --

A Again, Mr.Gillen, I did not use the word Erlich, I used the words Suffolk County District Attorney's Office.

THE COURT: No.

I think what Mr. Gillen is after is where in your notes does it say that he told the District Attorney's Office --

MR. GILLEN: That is right, sir.

THE COURT: (Continuing) -- that threats had been made against him.

A It is covered in the paragraph on page thirteen and I showed it to you.

Q Does it appear there?

THE COURT: DOes the word appear?

Q Doesthe word "threats" appear there?

A No, sir, it does not.

It says,

"McNamara stated that he was amazed that the Suffolk County Police Department and Suffolk County District Attorney's Office did nothing to help him after

he had gone to them and told them about Goberman."

Q But --

A It is covered in that paragraph, that is what is meant by that paragraph.

Q It means to you that he told you the word "threats" was used; is that right, sir?

A No, no, no. He used the word "threats", that he told Jack Erlich about the "threats."

Q Where in your --

A I did not use the word "threats" in my report, I said he had told them about Harry Goberman.

Q Did you use the word "threats" in your notes?

THE COURT: Well, I think now the question is is this the only paragraph which refers to a report or to a complaint to the District Attorney.

THE WITNESS: No, -- well, let me see -- no, sir, there was -- I think there is another paragraph which indicates that Desmond O'Sullivan arranged that meeting.

(The witness then perused the document.)

Q As a matter of fact, on the last page, I refer you to the last sheet, the second paragraph, will you read that, please?

A "A meeting was held during which Desmond

O'Sullivan was told of the threats against Mr. McNamara."

It continues:

"O'Sullivan subsequently arranged a meeting in his office with John Erlich, Assistant District Attorney, Suffolk County. At the conclusion of the meeting with Erlich it was Erlich's opinion that there was no violation of criminal statute and that the best way for McNamara to handle this situation was in a civil suit."

Q And this is what Tom McNamara told you: correct?

A That is correct, sir.

Q Or is in your report of what he told you?

A Yes, sir.

Q Is the word "threats" used there?

A No, sir, it is not.

Q AS a matter of fact Thomas McNamara had told you that Erlich's opinion was he should start a civil suit isn't that right?

A That is correct, sir.

Q Incidentally, you talked about a search warrant and a conversation with Timothy Shea, the lawyer: is that right, sir?

A Yes, sir, that is correct.

Q Did Mr. Shea tell you that there had been a release but it was no longer in existence?

A He said, "I know what you are looking for, the contract release, it is no longer in existence."

Q Did he tell you that there had been a release which Harold Goberman had signed and which Alex Gniazdowski had notarized?

A I don't recall at this moment, but if I can have a copy of my 302 as to that interview with Mr. Timothy Shea, I could use it to refresh my recollection.

Q Are you telling us that you cannot remember this incident with Mr. Shea unless and until you look at your report?

A No, I can remember the incident but I can't remember all the words, I would like to refresh my recollection.

Q So you need the report to refresh your recollection as to whether or not Mr.Shea told you that the contract release had been prepared, signed by Harry Goberman and notarized by Alex Gniazdowski and that it was no longer in existence?

A Wait a minute, wait a minute, wait a minute.

MR. RITCHIE: Your Honor, your Honor -- Mr. McMullen -- your Honor, I object to counsel not standing in front of the podium and not looking at the witness, but rather looking to the Jury.

MR. GILLEN: As a matter of fact I was handing this to the witness and I thought I was looking at the Judge.

THE COURT: That will do you no good.

BY MR. GILLEN:

Q Is that the report concerning Timothy Shea?

A I didn't look at it yet, I will take a moment to refresh my recollection --

Q Surely --

A (continuing) -- independent of the report.

Q You mean you don't need the report now?

THE COURT: No, he said before I look at the report let me see if I can revive my recollection without looking at the report.

MR. GILLEN: Yes, sir.

THE WITNESS: I will look at the report.

A Yes, sir, it does refresh my recollection.

Q And did Mr. Shea in fact tell you there was a contract release which was signed by Harold Goberman and notarized by Alex Gniadowski and which is no longer in existence?

A That is correct.

Q Thank you.

Q Do you know a woman by the name of Helen Goberman?

A Yes, sir, I do.

Q And can you tell us, please, is she any relation to Harry Goberman?

A Yes, sir, she is Harry Goberman's sister-in-law.

Q Have you ever had any interviews or have you made any interviews with Helen Goberman, you know, talk to her?

A Well, I have on occasion attempted to contact Mr. Allan Goberman at his home and there were times when Mrs. Helen Goberman was there so I have talked to her, yes, sir.

Q Well, when was the last time you talked to her?

A The last time I talked to her, I don't recall the date but it was with Special Attorney David Ritchie and I believe it was a week prior to the trial, maybe a week and a half prior to trial.

Q Rather about two weeks ago?

A Yes, sir, I would say roughly about two weeks ago.

Q And how long was that meeting?

MR. RITCHIE: Your Honor, I must object on the grounds of relevancy.

THE COURT: No, he may inquire.

A Let me see.

THE COURT: What was that?

THE WITNESS: I am thinking.

A How long, maybe an hour, maybe a little more.

Q How much more could it have been?

A I don't recall, I would say between -- to put it in a time frame, between one and two hours.

Q And did you speak with Helen Goberman at that time in the presence of Mr. Ritchie?

A Yes, sir -- well, she was -- she joined in the conversation, that is correct.

Q Have you ever spoken with Helen Goberman prior to this date?

A Yes, sir, when I interviewed Allan Goberman for the first time Helen Goberman was present seated at the kitchen table, that is correct.

Q When was this?

A October, '72, I believe is the first time.

Q Had you had any other interviews with Helen Goberman during that period?

A Well, interviews, I met her and talked to her. There was another occasion that I went to see Allan Goberman, he wasn't home and I had a casual conversation with Mrs. Goberman, that is correct.

Q How long was the casual conversation?

A I don't recall, Mr. Gillen, I know, I remember it being in the warm months and seated outside on the patio, I waited for a period of time for Allan to come home and he didn't

come home and I think I came back.another day.

(Continued on next page.)

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Q Were you talking with Helen Goberman on that occasion?

A Yes, I believe I was.

Q And how a period of time?

A I would say maybe half hour or so.

Q Did you ever make any notes of any conversations with Helen Goberman?

A No, sir, I never made any notes. We never discussed the case in detail. She was never able to provide us with evidence.

Q Never provided any evidence?

A No, sir. Never produced any evidence, or admitted to me anything that indicated she had other than hearsay knowledge about this case.

Q Didn't she tell you she saw Harry Goberman on June 28, 1972?

A Yes.

Q In the presence of Mr. Ritchie?

A She told me that, yes.

MR. RITCHIE: Your Honor, I --

MR. GILLEN: I mean, Mr. Ritchie was there when she spoke to --

THE WITNESS: Yes, she told me on June 28th, this is the first time she mentioned it to us in the pres-

ence of Mr. Ritchie that she had seen Harry Goberman that day at approximately 11:00 or 10:00 in the morning.

MR. RITCHIE: Your Honor, I move to strike that, that is hearsay.

THE COURT: Well, it certainly is hearsay, because we do not know, and Mr. McMullen doesn't know, therefore, he can't vouch for this to you, that she actually saw Harold Goberman that morning at that hour, or at all. You see, all Mr. McMullen can tell us on this recent interview is she said she had --

THE WITNESS: In fact, she wasn't addressing her comments solely to me, I was not conducting an interview of her, Mr. Ritchie was conducting an interview of Harold Goberman, and she interjected.

Q Did she tell you from her observation that Harold Goberman was not injured?

MR. RITCHIE: I object to any questions concerning an interview of Allen Goberman in which Helen Goberman said certain things, which is clearly rank hearsay.

MR. GILLEN: No, the witness testified --

THE COURT: Just a moment. That is pure hearsay, as I explained to the jury. If that is something you wish to present to the jury through Helen Goberman, you

must call her as a witness.

MR. GILLEN: Yes, sir. We are testing now the reports made by the FBI as to whether or not these are--

THE COURT: No, we are not. If you wish simply to elicit facts that are not reported in any report --

MR. GILLEN: That is correct.

THE COURT: You may.

MR. GILLEN: Thank you.

THE COURT: But not in detail, and not for the purpose of presenting to the jury the idea that's what Mrs. Helen Goberman is said to have said, is anything upon which they can place reliance.

MR. GILLEN: Your Honor --

THE COURT: Proceed.

Q Did you make any report whatsoever of Helen Goberman telling you she saw Helen Goberman on the 28th?

A No.

Q Did she tell you any other things concerning Harry Goberman on that day?

THE COURT: Did she -- Was there anything else that she said which indicated that she had information other than hearsay, her own observations?

THE WITNESS: Other than hearsay, I don't recall anything that she said. She said a lot of things about

her brother-in-law. She was very emotional. She made a lot of allegations about him and his character and so forth.

Q Did she anything as to whether or not he was injured on that day when she saw him June 28, 1972?

THE COURT: Objection sustained. We have just been over that together, Mr. Gillen.

MR. GILLEN: I am asking if there is any such report.

THE COURT: The question as to whether he has any note of her observations -- whether there were any observations other thar those which she made at this -- allegedly made -- on the morning of July 28th has been asked and answered.

MR. GILLEN: Fine.

Q Now, after this thing we were talking about with Allen Goberman, did you speak to Harry Goberman again?

A Immediately after, Mr. Gillen?

Q Immediately after, a day, a week --

THE COURT: After, and before he testified, I take you mean?

A Before he testified in this court, the only thing I said to Harry Goberman after that is, "Hello, how are you?"

Q Up to this time, did you know --

A Which time?

Q The time you spoke with Helen Goberman, did you -- a couple of weeks ago, did you know that Harry Goberman returned to LenAl after this alleged meeting?

A I would have to say -- Up until the time I spoke to Helen Goberman?

Q Right.

A I don't recall, Mr. Gillen. I don't recall now. For the sake of argument, I will say I did not.

MR. RITCHIE: Objection.

A I don't recall if I knew that he returned to LenAl.

Q As a matter of fact, you were present in the courtroom when Harry Goberman testified back in January, correct?

A Yes, I was. I was present for part of the testimony.

Q As a matter of fact, hadn't Harry Goberman told you that he went to the station house, called somebody up, and went to this Dr. Venturo, or a doctor, and -- Hadn't he told you that?

MR. RITCHIE: Objection, as being clearly irrelevant. The testimony was in court. The testimony could

have been read to the witness Harry Goberman. It was not read. There were reports of interviews by Mr. McMullen, and I believe that is what should be used.

THE COURT: The objection as to the form of the question is sustained.

MR. GILLEN: I will need a few minutes to locate all the reports concerning Harry Goberman.

(Pause.)

THE COURT: Mr. Gillen?

MR. GILLEN: Yes.

THE COURT: Mr. Gillen?

(The following took place at side bar.)

THE COURT: He testified at the end of your direct (indicating).

MR. RITCHIE: I believe it is in a report.

MR. GILLEN: The other trial after he was beaten he went to a doctor in East Northport. He never testified he went back to LenAl in the other trial. I am talking about Harry GobermaN.

THE COURT: Do you have the other trial handy? It's all down here (indicating).

MR. GILLEN: I think I can locate that in a moment from my notes.

THE COURT: All right.

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(The following took place in open court.)

Q Mr. McMullen, I show you 3500-7, and I ask you, is this a report you made concerning an interview of Harold Goberman?

A Yes, sir, it is.

THE COURT: When was the interview?

THE WITNESS: August 28, 1972.

Q I show you another report of interview dated -- Well, the report is September 19, 1972, is that correct?

A Yes, sir, that is correct. September 19, 1972. Yes, sir, it is correct.

Q In either of those reports, does it appear as to whether or not Harry Goberman went to LenAl?

THE COURT: Said he went.

Q On June 28, 1972.

A No, sir, there is nothing in the report indicating that Harry Goberman told me he went to LenAl Contruction on June 28, 1972.

Q Are there any other reports, main reports -- I do know, Mr. McMullen, there are some reports and photographs --

A I will concede these are the --

THE COURT: Key --

THE WITNESS: Key interviews of Mr. Goberman.

Q When for the first time did you learn that Mr.

Goberman went to --

THE COURT: No. When for the first time were you told that he had been to LenAl on the morning of June 28, 1972, after the episode?

THE WITNESS: By Harry Goberman, or anyone else?

Q By anyone.

A I honestly don't recall. If I was told prior to the interview of Allen Goberman that he had been back to LenAl--

Q The one you had spoken to was Harry Goberman to make the reports?

A Yes.

Q When for the first time did Harry Goberman tell you he was involved in hijacking?

MR. RITCHIE: Objection on the grounds of relevance.

THE COURT: That --

MR. GILLEN: I will withdraw that question.

Q There came a time, did there not, when you interviewed Harry Goberman relative to the testimony and complaints he made to this Court, is that correct?

A Yes.

Q Now, at that time, did you inquire into the background of Harry Goberman, of Harry Goberman?

A At the time of the interview?

Q Yes.

A No, sir, I did not.

Q Did Harry Goberman tell you that he used aliases?

MR. RITCHIE: Objection, your Honor, it is irrelevant.

THE COURT: Well, I think that is irrelevant.

MR. GILLEN: Your Honor, there is one point that does make it relevant.

MR. RITCHIE: May we have this at side bar, your Honor?

(The following took place at side bar.)

MR. FISCHETTI: I was going to stand before Mr. Gillen started to speak. That is a substantial portion of my opening of what we would prove to the jury. That is, Harry Goberman, among other things, has fooled the Government, and he did not tell them the true story of himself, his aliases, lawsuits, criminal record, in inducing them to initiate this prosecution.

MR. GILLEN: There is another point.

THE COURT: I think they knew all that before they filed the indictment.

MR. GILLEN: No. We told them from the witness stand.

MR. LEONE: He took the Government by surprise.

THE COURT: They didn't have a --

MR. LEONE: They didn't have a list of the aliases--

THE COURT: The aliases, who care about that. What about a list of his felony convictions?

MR. RITCHIE: Yes, your Honor.

THE COURT: Did they have that before the indictment?

MR. RITCHIE: I was aware of his record. I passed it on to Mr. William Lynch in Washington at the time we decided on prosecution in this case, because of the position of Mr. Thomas McNamara, Jr. Mr. Lynch, out of a desire to exercise proper prosecutorial discretion, asked me to supply a detailed listing on the facts in the case beyond the scope of a normal memorandum. He asked me to supply him with the background of Harry Goberman. I did not have all the aliases. I did, however, supply him with the rap sheet of Harold Goberman. I specifically recall that.

MR. GILLEN: And the murder and lawsuit, you never knew about that.

MR. RITCHIE: I was aware of the murder testimony. I don't know that I passed this on to Mr. Lynch. It is clearly irrelevant. He was not prosecuted for it. But I was aware of the fact that he had testified in the

Silver Somers murder --

MR. GILLEN: Did you know he had immunity at the time? In a conversation we had, you said he testified as John Q. Citizen.

MR. RITCHIE: I don't know --

MR. GILLEN: I have another point, your Honor.

With this business on -- Actually, it is Ms. Seltzer's point -- that is, the intention that when Mr. Morella was asked, Do you know Harold Goberman, he understood the name to be Goldman.

MR. FISCHETTI: I think Mr. McNamara is ill, your Honor.

THE COURT: Then we will take a short recess.

(The following took place in open court.)

THE COURT: We will have a short recess, Members of the Jury. Don't discuss the case with one another, or anyone not on the jury until it is given to you for your determination.

(The jury left the courtroom.)

THE COURT: I imagine he would not try to walk. You know, there is an attorney's lounge where he can lie down for a while.

MR. RITCHIE: There is a nurse in the building.

MR. MEISELMAN: Perhaps we better call the nurse.

DEFENDANT MEROLLA: He has a nitro pill.

THE COURT: Then he doesn't need any of mine.

DEFENDANT MEROLLA: No, I gave him one.

MR. MEISELMAN: I think we better call the nurse, I don't want to take responsibility.

Maybe we can take a lunch hour now.

THE COURT: And come back at 1:30.

MR. RITCHIE: I would be in favor of that.

THE COURT: We will break now until 1:30.

MR. RITCHIE: Yes, your Honor.

THE COURT: You don't mind if I tell the jury?

MR. LEONE: No objection.

MR. FISCHETTI: No objection.

(A recess was taken at this time until 1:30 this afternoon.)

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AFTERNOON SESSION

October 17, 1974

1:35 p.m.

(The following occurred in the absence of the jury.)

MR. FISCHETTI: Judge Dooling, rather than doing this at the side bar during one of our cross-examinations, it occurred to me that during the course of cross-examination by one of us as defense counsel that it might be posed to Agent McMullen the status of Angelo and Rocco Merolla, in other words the question might be asked whether or not they are now presently charged with any crimes.

I thought it best to do this outside the presence of the jury to get your Honor's possessive ruling on it.

Your Honor, I feel that Mr. Ritchie in his opening indicated that Angelo and Rocco Merolla took part in at least one beating and were present on both occasions, on June 5th and June 28th, and at several of the meetings at the diner.

The Government's main witness, Harold Goberman, testified that Angelo and Rocco Merolla were present on several occasions and that in one or both of the occasions both beat him.

Your Honor, the jury know is left unaware completely of the status of Angelo and Rocco Merolla.

I am not offering to bring out the fact that they were acquitted, merely that they are not presently charged with any crime in this indictment. I think we are entitled to show that and I ask you now, sir, for a ruling rather than doing it in front of the jury.

MR. RITCHIE: Your Honor, it has already been testified to in effect that they were present at the first trial, and I think that to state that they are no longer or that they are not presently charged with any crime is to inform the jury of prior jury verdicts, and to do that would be to, well, greatly to the detriment of the United States of America, that is to inform the jury of what 12 other individuals thought at one time, and to do so I think would be highly prejudicial to the United States when the fact -- well, I won't go on, I think your Honor can understand.

THE COURT: Well, you see --

MR. LEONE: Well, there is the other side of the coin, they might infer that they were found guilty.

MR. FISCHETTI: You see -- if I can take it

right from Mr. Ritchie's analogy, there is now testimony that there was a prior trial of at least these defendants or some of them except for Alphonse Merolla and Angelo and Rocco. Now, you don't have to be a lawyer --

THE COURT: You see, let us not go into it too much, well, Angelo has been present at this trial --

MR. FISCHETTI: That is right, but just on that point --

THE COURT: (Continuing) -- and indeed has been asked to stand up, etc., etc., so that --

MR. LEONE: By the prosecution.

THE COURT: What?

MR. LEONE: By the prosecution.

MR. FISCHETTI: No, we asked him.

MR. LEONE: Originally, originally by the prosecution.

THE COURT: It doesn't matter, but the jury knows he is here in the courtroom and that he has been involuntarily involved in the testimony at times, so that the mere fact that both Rocco and Angelo Merolla were present at the earlier trial and they have been described as being in the room doesn't necessarily disclose that they were defendants

and that somehow or other they no longer are.

Now I suppose you know what is usually done in the case where somebody has seated or has been acquitted and both sides are entitled to have it told that that has nothing to do with the case and that it does not afford any inference by the way.

Well, it is one thing to deal honestly with these things with the jury and the other is to hope for the best. Well, I think too many things have happened in the courtroom in my time for me individually to have any confidence that things happen for the best, I mean things which are carefully kept from the jury. I have had such things and we have learned immediately after the jury goes away and having rendered their verdict that nothing was kept from them, they knew what was going on the whole time.

So that then you see you run the risk that the jury will substitute their own reconstruction of what must have happened.

Now, here you see I don't know, the case isn't over, I don't know whether anyone in the case has intention of asking either Rocco or Angelo Merolla to be a witness, but assume nobody does, then the jury is going to wonder, Well, well, what is the

matter, there are two missing witnesses and two critically important witnesses to the main event of this two-event case, if you want to call it that, that is if they are not called by either side.

Now what that usually spells in a civil case, and I think Bill Walsh and I have concluded this is that there is a disagreement. The jury doesn't like to decide cases on which they haven't heard the evidence.

Now everybody is exposed to this one, and in a way the rub-off might be a little worse on the defendant because after all their names are Merolla and presumably they wouldn't do their brother and second cousin twice removed, or whatever, in if called.

So it isn't simple, it isn't easy, and it is not simplified additionally by the fact that the jury happens to know that they were interested spectators.

MR. FISCHETTI: I don't represent one of the Merollas, but I can see your Honor's analogy and it could really cut both ways. I think the average juror could conclude that no one could call Angelo or Rocco Merolla because they in fact were guilty, and therefore not knowing what the result was, being guilty they can't call them to the stand.

THE COURT: You see, it gets worse and worse and worse because --

MR. FISCHETTI: That is right.

THE COURT: (Continuing) -- because if they know they were acquitted then you people are utterly defenseless because there is no reason not to call them.

Now I can try some fancy explanation like they pleaded the Fifth Amendment --

MR. FISCHETTI: It is a little too fanciful for me.

THE COURT: I technically could do that because they were just acquitted of the conspiracy and under the somewhat exotic principles of law that govern in the criminal field I suppose they could still be indicted for a hurry-up substantive participation, unthinkable but conscious.

So are there any other problems?

MR. FISCHETTI: Perhaps we should think about it again and come to your Honor a little later with our motion. In this way we could probably make a joint motion on behalf of all of the counsel.

THE COURT: To do what?

MR. FISCHETTI: I don't know. I may ask your Honor to instruct the jury or to have it made known

to them what the status of Angelo and Rocco is.

THE COURT: So I will do nothing.

You can all get together.

I am perfectly honest in saying to you, and I think this would be an absolutely blind guess as to who is going to be heard --

MR. FISCHETTI: We have been thinking of the problem several days and we haven't come to a conclusion so we are amenable to any suggestions the Court might have also.

THE COURT: You see, my own feeling is that for better or the worse -- well, you know, it is like what a fabled old time negligent lawyer is supposed to have said to his witness, and he is supposed to have said at the conclusion of each preparation of the witness, At the trial now, remember when in doubt tell the truth.

In that way I suppose we are tied to the consequences of the truth rather than to the consequences of the incomprehension or mistake; sometimes you are better off to be visited with the consequences of the truth if you can't control the arrow.

MR. RITCHIE: Your Honor is reserving a ruling of Mr. Fischetti's motion?

MR. FISCHETTI: As a matter of fact, your Honor, I've withdrawn it.

THE COURT: I am reserving, I'm reserving on everything, as I say, pending some discussion among counsel.

MR. RITCHIE: Pending discussion.

Can the Government have a direction to the defense attorneys not to raise the subject of the status of Angelo and Rocco Merolla before this jury?

MR. FISCHETTI: Yes, that is my representation.

THE COURT: I think everybody had better stay away from that until maybe we can think it out and around together.

MR. FISCHETTI: All right, thank you, sir.

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(At 1:50 o'clock P.M., the jury took its place in the jury box.)

R I C H A R D M C M U L L E N , recalled as a witness, having been previously sworn, continued to testify as follows:

THE COURT: All right, Mr. Gillen.

MR. GILLEN: Thank you, your Honor.

CROSS EXAMINATION

BY MR. GILLEN: (continued)

Q Mr. McMullen, this conversation you had with Mr. McNamara was on February 15, 1973; is that correct?

A Yes, sir.

Q When for the first time had you spoken to Mr. Harry Goberman, was it on or about August 28, 1972?

A That is the exact date, yes, sir.

Q Was that the first time he had ever spoken to any agents of the Federal Bureau of Investigation, to your knowledge, in connection with this matter?

A With that matter?

Q That is right.

A Yes, sir, it is.

Q Now, did you ask Harry Goberman after your conversation with Thomas McNamara for his records of his employees that worked on the Nesconsett Highway job?

A No, sir, I did not.

Q Didyou ask Harry Goberman for the names of the people -- did you ask him personally for the names of the people that worked on the Nesconsett Highway job?

A No, I did not ask him for all the people that worked on the job.

Q Now, tell us, please, did you ever interview any of the employees of Mr. Goberman, who worked on that job, to ascertain whether or not in truth and in fact Harry Goberman had threatened Thomas McNamara?

A Yes, sir, I did.

Q Whom did you question?

A Gary Taibbi and Vincent LaPorte.

Q Is there any relationship between Vincent LaPorte and Harry Goberman?

A Yes, sir, there is.

Q He is his in-law of some sort; isn't he?

A I believe he is married to Harry Goberman's sister.

Q And they are the only two you inquired of, Gary Taibbi and this Vincent LaPorte?

A That is correct.

Q What about any of the others, machine operators or carpenters or welders or electricians or plumbers or anybody else on the job --

MR. RITCHIE: Objection --

Q (continuing) -- did you question --

MR.RITCHIE: I'm sorry, finish.

THE COURT: These are subcontractor employees, many of them would be subcontractors.

MR. GILLEN: All right, fine.

MR. RITCHIE: I object on grounds of relevancy, your Honor.

THE COURT: In that respect it is overruled.

MR. RITCHIE: Yes, your Honor.

THE COURT : These are subcontractor employees.

MR. GILLEN: I will split it.

Q Now, did you ever ascertain how many of the employees of the HarMac Corporation worked on the job?

A No, sir, I don't believe I did.

Q Did you ever have any idea at all of how many?

A How many employees of HarMac worked on the job?

Q Yes, sir.

A No, sir, I didn't.

Q During this period of time that Mr. McNamara says that threats were made by Harold Goberman, did you ever try to find that out?

A I asked Mr. McNamara for the names of

witnesses.

Q But did you ever ask Mr. Goberman for the names of his employees so that you could conduct an investigation as to whether or not those employees overheard any threats?

A No, sir.

Q All right.

Did you go to any of the subcontractors on the job to ascertain whether or not they heard any threats made by Mr. Goberman to Mr. McNamara?

A Yes, sir, I believe I have talked to several subcontractors on the job. I don't know, I don't recall if I ever asked them if they ever heard of threats of violence with the exception of one.

Q Was that after Mr. McNamara told you of these threats?

A Yes, sir, this was after, yes, sir.

Q So if I understand you, sir, your investigation into whether or not threats occurred did not encompass the questioning of the subcontractors who were on that job; is that correct?

A That is right.

Q Except for one, that is?

A Yes, sir, that is correct, Mr. Gillen.

Q You had put a great deal of time and effort into this investigation; isn't that correct?

A Yes, sir.

Q Now, from your investigation, did you ascertain that Harry Goberman never threatened Thomas McNamara?

MR. RITCHIE: Objection, your Honor.

THE COURT: Well, I think that is hardly the proper form of question.

Q After February 15th, the interview with Mr. McNamara, did you make an investigation of the people that were on that job, other than those you have already told us, to ascertain whether or not Harry Goberman, in truth and in fact, threatened Thomas McNamara?

A No, sir, I did not.

Q When for the first time, Mr. McMullen, did you learn that Harry Goberman was suing Thomas McNamara for two and a half million dollars?

A I would say sometime shortly after the investigation was begun, the exact time I don't recall. I do recall a telephone conversation in which Harry Goberman mentioned that to me in the name of his attorney who was representing him, so I would have to say that that became my knowledge in the fall of 1972, prior to the month of November.

Q Did you know it was for two and a half million dollars?

THE COURT: That is in 1972?

THE WITNESS: Yes, sir, yes, your Honor.

A Did I know that it was for two and a half million dollars?

MR. RITCHIE: Objection, your Honor, assuming facts not in evidence.

The only evidence in this trial is one and a half million dollars.

MR. GILLEN: Only a million and a half.

Q Did you know it was one and a half million?

THE COURT: As I recall it, there was something in the welfare clause --

Q Did you know that it was a million and a half?

A I don't know, I don't know what it was exactly, but I know it was a substantial sum, yes, I know that.

THE COURT: I thought it was a million.

BY MR. GILLEN:

Q Did you inform Mr. Ritchie of that?

A Yes, Mr. Ritchie knew of that.

Q Is there any report of that?

A No, there isn't.

Q It is never in any report or it didn't find its way in any of the court's records of this case?

A No, I didn't think it was relevant.

Q Do you know other than using his known name -- When did you first learn that Harry Goberman used names other than his own?

A I first learned that he used names other than his own -- well, it is difficult to ascertain the exact date but I would say it was subsequent to the interview of Harry Goberman after conducting law enforcement checks and it was a relatively short period of time after he talked to me on January 28th.

Q What name did you learn he had used?

A Masters and Masterson.

Q Is there any report on that, your learning about his using the aliases?

A I don't believe there is.

Q When for the first time did you learn that he used the alias of Russell Lampert?

MR. RITCHIE: Objection, your Honor, irrelevant.

THE COURT: He may answer that.

I hope we are not going to go through them all.

MR. GILLEN: We are not going to go through

all of them.

A Well, the only two names that I recall definitely knowing that he used, you know, during the course of his lifetime was Masters and Masterson. It had been mentioned to me that he has several times during the course of the investigation and prior to January of 1974, that he had used aliases, many aliases, the specific names I don't recall being mentioned.

Q Is it fair to say that the first time you learned the extent of his aliases was in this courtroom back in January?

A The extent, yes, sir, that is fair to say that.

Q Have you heard the name of Salvatore Spatsarella?

A Yes, sir, I have.

Q And have you heard the name All American Cartage?

A Yes, I did, I've heard of that.

Q If you know, is Salvatore Spatsarella really All American Carting?

A Is he All American Carting?

Q Yes, sir.

A I know he is a principal of All American

Carting.

Q When did you first learn, Agent McMullen, of any connection whatsoever between Salvatore Spatsarella and Harry Goberman?

A I believe subsequent to August 28th I learned of it through several sources, the first source was a former attorney for the District Attorney's office in Suffolk County, I believe that would have been either late September or probably early October of 1972.

I also learned that from the Suffolk County Intelligence Squad, around that time when I was doing some back checks on Harry Goberman, and I also learned it from the Suffolk County Homicide Squad.

Q You just mentioned background checks on Harry Goberman, how much time did you put in investigating the background of Harry Goberman?

A I can't give you a specific amount of time, I will tell you observations that I made and there were other people who would have done some checking for me and made the results of that known to me.

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McMullen-cross/Gillen

Q Now, sir, in your investigation, Mr. McMullen, have you accounted for Harold Goberman's movements during the day of June 28, 1972?

A I have not accounted for -- I personally have not accounted for every, say, hour of that day that Harold Goberman, you know, what he did every hour of that day.

Q Have you attempted to account for it?

A Yes, sir, I think I have, I have attempted to account for it by interviewing of Mr. Goberman.

Q By interviewing of Mr. Goberman; correct?

A Yes, sir, and of interviewing of others.

Q Now, did Dr. Punturo, and he has testified here in this court, did he tell you that Harry Goberman came to him late in the evening at approximately 8 or 8:30 on June 30, 1972?

A Did he tell me that?

Q Yes, is that right?

A I don't believe he did.

Q Did you learn that in this courtroom?

A I wasn't in the courtroom when Dr. Punturo mentioned that.

Q What time did Harry Goberman tell you he went to this doctor?

A I think he said, I believe he said --

McMullen-cross/Gillen

MR. RITCHIE: Objection, your Honor, this is a matter that Mr. Gillen should probably have elicited from the witness Harry Goberman, this is all hearsay now.

THE COURT: No, no, no, it was sought for a very different purpose. Your point is well taken, this is thorough-going hearsay, however the jury has heard both the testimony of Harold Goberman and the testimony of Dr. Punturo and now we are concerned with only what Mr. Goberman and Dr. Punturo said to Mr. McMullen on the same subject that they testified to here, that is in connection with Mr. McMullen's investigation of the case --

MR. RITCHIE: Yes, sir.

THE COURT: (continuing) -- and it is for that limited and only that limited purpose.

BY MR. GILLEN:

Q Do you remember my question?

I believe the question is what time did Harry Goberman tell you that he went to the doctor?

A I don't know if he fixed a time, I think he may have indicated that it was subsequent -- in the afternoon, in the afternoon or afternoon sometime after he left McNamara, that sometime during that day he did go to

the doctor.

Q Would it be fair to say that in your interview with him he said he went shortly after he had left the police station?

A No, I don't think that is fair to say.

Q Well, if you look at your report, can you tell us, please, what he did tell you?

THE COURT: This is the August 28th report?

MR. GILLEN: It is either that or -- there are really two reports, your Honor.

THE WITNESS: I believe it is August 28th.

(The witness then examined a document.)

Q Look, look at the last sheet.

A Yes, sir, I have it.

Q Didn't he tell you after he was beaten and he left McNamara, that he went to a doctor in East Northport, New York, and was examined and given a letter describing his injuries?

A Yes, sir, he stated that and that after he was beaten, he went to a doctor in East Northport, but he didn't specify the time that he went to the doctor nor did he indicate whether he went immediately to this doctor.

Q Did you ask him what time he went to this doctor?

McMullen-cross/Gillen

A I believe I tried to elicit from Mr. Goberman, you know, exact time, but his memory was vague as to the exact times, but he said he knows he went to the doctor and that he found the doctor's name in a telephone book and had trouble finding a doctor because this was after office hours on that particular day.

Q This was two months to the day of the interview, after the alleged incident on June 28th, June 28th to August 28th?

A That is correct.

Q Did you make any notes as to any times that he claimed that he went to this doctor?

A No, I did not.

Q Now, back in January, on January 18, 1974, at page 1596, were you asked these questions, Mr. McMullen, and did you give these answers at line 4 --

MR. GILLEN: Page 1596.

MR. RITCHIE: Thank you.

MR. GILLEN: The 4th line.

Q "Question: How much did you spend checking Harold Goberman's background?

"Answer: Checking" --

THE COURT: "How much time?"

MR. GILLEN: It just says, "How much did you

spend checking Harry Goberman's" --

THE COURT: I imagine there is a dropped word there.

MR. GILLEN: But in the context it comes in.

Q "Answer: Checking his background?

"Question: That is right.

"Answer: Several hours. I couldn't say I checked our files concerning his background and the police files and so forth."

Now, were you asked that question and did you give that answer?

MR. RITCHIE: Objection.

A Yes, sir.

MR. RITCHIE: Objection on the grounds of relevancy.

THE COURT: Objection overruled.

A Yes, sir.

Q So you had then spent several hours checking into Mr. Goberman's background; is that right, sir?

A That is correct, sir.

Q And you didn't spend -- I will withdraw it.

Did you ever talk to a man by the name of John Sini, S-i-n-i?

A Yes, sir.

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McMullen-cross/Gillen

Q And when is the last time you spoke to John Sini?

A Two weeks ago in the presence of Special Attorney David Ritchie and Marsha Katz.

Q Did you make a report on that?

A No, sir.

Q Did you make any notes of that conversation?

A No, I did not.

Q Was there a conversation with Mr. Sini about a check for $25,000, disbursements by the McNamaras?

A Yes, sir, there was.

Q But you didn't make a report on that; is that right?

A No, sir, I did not.

MR. GILLEN: I have nothing further of this witness.

CROSS EXAMINATION

BY MR. FISCHETTI: (continued)

Q Mr. McMullen, were you present in the courtroom yesterday when Allen Goberman testified?

A Yes, sir, I was present.

Q Did you hear Allen Goberman tell this jury that on June 5th, someone was outside the room with him?

A Yes, sir, I did.

Q Did you hear him or see him look around the courtroom and attempt to identify that individual?

A Yes, sir.

Q Did you hear him testify that that individual was not one of these defendants?

A Yes, sir, I did hear him say that.

Q Did you hear him testify most particularly that the individual was not John DeLiso?

A Yes, sir.

Q Now, you told Mr. Gillen, did you not, that you prepared these reports called 302's rather carefully; is that a fair statement?

A Yes, sir, it is a fair statement.

Q And that you put everything pertinent that you can think of in an interview into these reports?

A Yes, sir, as I was told it by the witness.

Q And you interviewed Allen Goberman; did you not?

A Yes, sir, I did.

Q On October 13, 1972?

A I believe that was the date.

Q Several months after June 5th?

A That is correct.

(At this point Mr. Ritchie stood at counsel

table.)

MR. FISCHETTI: I am only wondering whether Mr. Ritchie is going to make objection or is standing next to me to keep me company?

THE COURT: He thinks thatyou are going to put a question which he wants to object to.

MR. RITCHIE: I will sit down until I make an objection.

THE COURT: He hopes you will mend your ways.

BY MR. FISCHETTI:

Q Now, on that interview of Allen Goberman, did he identify to you the man who was standing outside the door with him?

MR.RITCHIE : Objection, your Honor, Mr. Allen Goberman has already been questioned on that.

THE COURT: I am sorry?

MR. RITCHIE: The facts have been elicited through Mr. Allen Goberman already with respect to this, this has been asked and answered, it is repetitious.

MR. FISCHETTI: I'm asking whether he --

THE COURT: No --

MR. FISCHETTI: Whether he told Mr. McMullen--

THE COURT: No, Mr. Allen Goberman was asked

about the same episode.

MR. RITCHIE: Yes, your Honor.

THE COURT: And did he testify about it?

MR. RITCHIE: Yes, sir.

THE COURT: I think Mr. Fischetti may also examine Mr. McMullen about it since both were equally present and may have the same or different recollections about it.

MR.RITCHIE: My objection only is that it is collateral and that there has been --

THE COURT: Oh, no, I can't agree on that.

MR. RITCHIE: Yes, your Honor.

(continued next page.)

Agent McMullen --

A Is there a question?

Q No, I am about to ask one.

Agent McMullen, who did Allen Goberman identify as the man who was standing outside the door with him on June 5th?

A John DeLiso.

MR. PISCHETTI: Nothing further.

CROSS EXAMINATION

BY MS. SELTZER:

Q Agent McMullen, you were present on May 8th when Mr. Ritchie was interviewing Mr. Merolla, Alphonse Merolla, is that correct?

A Yes, ma'am, that is correct.

Q You wrote a 302 of the conversation that was had, is that correct?

A Yes, ma'am.

Q You also testified, I believe, this morning, that Mr. Merolla was given his rights; is that correct?

A Yes, ma'am.

Q Was one of the things told to him at that time anything that he said could be used against him at a later time?

A Yes, ma'am.

Q He was advised of that?

A Yes, ma'am.

Q Prior to this conversation on the same day, I believe we were advised that a card, business card, was taken from Mr. Merolla; is that right?

A Yes.

Q Taken from his pocket?

A From his wallet, I believe.

Q Was he present at the time?

A Yes.

Q Did he see it being taken from his wallet?

A Yes, ma'am.

Q On that business card there was a name of Mr. Harold Goberman and his telephone number; is that correct?

A Yes.

Q This was done in the presence of Mr. Merolla?

A Yes.

Q It was a short time thereafter this interview was had in Mr. Merolla's office?

A I don't believe so.

Q How long after? A few hours? One Hour? Two hours?

A I would say approximately two hours.

Q By the way, during this interview, Mr. Merolla was asked questions about his personal life, wasn't he?

A Yes, ma'am.

Q Your 302 reflects that?

A Not on that 302, there were two 302's, concerning biographical data --

Q You elicited that he was married?

A Yes.

Q In fact he has two children?

A That is correct.

MR. RITCHIE: Objection on the grounds of relevance.

THE COURT: I will take it. I take it is leading to some other point.

A Idid not ask those questions, Mr. Ritchie asked him are you married and do you have children.

Q Was anybody else present during the course of this interview?

A Yes.

Q Who was?

A Another agent.

Q What is his name?

A Kenneth Spielfogel, S-p-i-e-l-f-o-g-e-l.

Q It is a fact you say Mr. Merolla was

advised anything he said could be used against him?

MR. RITCHIE: Objection.

THE COURT: Yes.

MR. RITCHIE: It has been asked and answered.

THE COURT: Asked and answered.

Q Isn't it a fact, Mr. McMullen, the question asked Mr. Merolla was, do you know Harry Golden?

A No.

Q How about Harry Gobeman?

A No.

Q Do you know if Mr. Ritchie has a tendency to mumble?

A I don't know if he has a tendency to mumble.

THE COURT: I think that is the answer. If he knows it, so does the jury.

MS. SELTZER: I have no further questions.

Wait, I am sorry.

Q You have heard Mr. Goberman use the name Goldman in the courtroom?

A Yes.

Q That is the alias that he is going under?

A I don't know --

MR. RITCHIE: On the grounds of relevancy, objection. We already had testimony he wasn't

aware of the name Goldman prior to January, 1974.

THE COURT: The question is, is he not now aware that Harry Goldman is an alias currently in use by Mr. Goberman. Is that your question?

MS. SELTZER: Yes.

MR. RITCHIE: My objection is on the grounds of relevancy. It has no probative value.

THE COURT: Sustained.

MS. SELTZER: No further questions.

THE COURT: It's really sustained on the ground it was argumentative.

MR. RITCHIE: Mr. Leone?

MR.LEONE: I have no questions.

REDIRECT EXAMINATION

BY MR. RITCHIE:

Q Mr. McMullen, have you been able to understand my questions when I put them to you?

A Yes.

Q You understand the words I have used?

A Yes.

Q May of 1974, had I ever --

THE COURT: '73?

MR. RITCHIE: 1973.

MR. LEONE: I object to that. There is an

objection. The question being put is doyou know whether or not I ever knew of the name. How can he know that?

MR.RITCHIE: I will withdraw it.

Q Mr. McMullen, have you been in contact with my office and with me during the course of your investigation in this case?

A Frequently.

Q Have you ever used the name Harold Goberman to me in the course of this case?

A Yes.

Q Have you ever used the name Harry Goldman to me in the course of this case through May, 1974?

A No, sir, I did not know that name.

Q At the time of this interview, are you aware of whether the indictment that frames the issues in this case had been filed?

A Yes, I am aware it was filed.

Q Is it not a fact the name Harold Goberman has been used during the course of that indictment?

A The name Goberman was used.

Q The name Goldman used?

A No, sir.

Q Were any other items besides this business

card seized from the person of Alphonse M. Merolla?

MR. FISCHETTI: Objection.

Q Were any other items seized --

MR. FISCHETTI: Objection.

THE COURT: Yes or no?

MR. FISCHETTI: Objection. Can you take it at side bar?

(The following took place at side bar.)

MR. FISCHETTI: I did it for a purpose. Only because Ms Seltzer was not present at the last trial. I made a demand for anything seized from my client at the last trial. The only thing turned over was the business card. I have no idea what this is. It may be nothing, but I have no idea.

THE COURT: Was that the purport of your question?

MR. RITCHIE: My purport was to the effect there wasn't one name seized, there was a large number of names seized. I will go into the names --

MS. SELTZER: There was an agreement between the parties and it seems to me Mr. Ritchie is violating that agreement now.

MR. RITCHIE: If you will recall, you and I

had a conversation in which I told you I would turn over to you, and you agreed to that, you spoke on the telephone --

MS. SELTZER: Can you kindly keep your voice down?

MR. RITCHIE: I am very angry now. You had agreed with me, Ms. Seltzer, that I had fully complied with the agreement to -- between you and I and if you will recall, Ms. Seltzer, you asked me for discovery less than two weeks before the trial and I supplied a great deal of discovery to you and you stated it was satisfactory.

THE COURT: I understood there was an agreement that none of the other names that appeared on that card would be disclosed.

MR. RITCHIE: That is correct.

THE COURT: I inferred it had other names.

MS. SELTZER: There were other names and telephone numbers.

THE COURT: I understood the stipulation was not to disclose any of the other names on the card and I suppose --

MR. FISCHETTI: Your Honor --

THE COURT: The other names on the card

were names that might compromise Mr. Goberman -- Mr. Merolla.

MR. FISCHETTI: Certainly. That's why we have the stipulation --

THE COURT: He has said, was anything other than the card seized. That does not disclose any names that are on the card.

MS. SELTZER: I would request --

MR. FISCHETTI: What is he going to introduce?

MR. RITCHIE: The fact that this wasn't a card with Harry Goberman's name alone.

THE COURT: You can't have that, that was stipulated.

MR. GILLEN: It was on the back of the card.

MS. SELTZER: I understand, I think I saw a copy of the business card, certain girlfriends names and married people were on it and under the circumstances it was agreed to leave this kind of information out.

MR.RITCHIE: That was notthe basis, it was the basis of Fat Al, and things -- names like that. It was on the basis of names that might give to some people the connotation Mr. Alphonse Merolla had, in the past, associated with people with

colorful aliases.

THE COURT: I assumed as much, but there was a stipulation that no other names would be used.

MR. RITCHIE: That is correct.

THE COURT: My question to you is, is that what this question calls for?

MR. RITCHIE: No. What it calls for is the fact other names were on the card without going into the names. Your Honor, on cross --

THE COURT: No. You can't do it and that is the end.

(The following took place in open court:)

MR. RITCHIE: I will withdraw that question.

Q That business card, was it a business card of Harry Goberman?

MR. GILLEN: Objection. That was asked and answered.

THE COURT: No. Business card of Alphonse M. Merolla, on which was written Harry Goberman with his phone number.

THE WITNESS: No, sir, it was not.

MS. SELTZER: Can we have a side bar?

THE COURT: Yes, of course.

(The following took place at side bar:)

MS. SELTZER: My feeling is Mr. McMullen was ready to blurt it out that there was a name.

THE COURT: Whose card was it?

MR. RITCHIE: The business card printed up for McNamara Buick Pontiac. But I am not interested in --

THE COURT: That is the end of questioning about the God damn card. You stipulated it out and it is out. Don't do any more.

MS. SELTZER: Thank you, your Honor.

MR. RITCHIE: If I may --

THE COURT: No, you may not.

MR.RITCHIE: Yes, sir.

(The following took place in open court:)

MR. RITCHIE : I will withdraw that question.

Q Directing your attention to the date on which you executed the search warrant, was that the first time you were informed by Mr. Shea that the contract release had been in existence but no longer was in existence?

A Yes.

Q Had Mr. Shea ever told you previously anything about any contract release?

A Yes.

Q When had you first spoken with Mr. Shea about

contract releases in connection with this job?

A In February, 1973.

Prior to February 15th. Approximately one week prior to February 15, 1973.

Q Mr. Shea was there -- By the way, where was this?

A In your office, in the other building.

Q Mr. Shea was there, you were there, who, if anyone else, was there?

A I was there, you were there, and an attorney by the name of Raymond Bergen was there, and Mr. Shea.

Q What, if anything, did Mr. Shea say to you at that time concerning any contract release?

A At the conclusion of that meeting, Mr. Shea offered to produce on behalf of Mr. Thomas McNamara any documents pertaining to the business relationship between Harold Goberman and Mr. Thomas McNamara.

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Q What, if anything did you say to that?

A I said, well, I would like to include any general contract release.

Mr. Shea said there weren't any. The only release that Harold Goberman signed was a waiver of mechanics lien.

We left it at that.

Q Subsequent to that conversation with Mr. Shea, was a subpoena served on McNamara re NuCar --

A Yes.

Q This first conversation, there was no legal process in telling him to produce those records?

A No, sir, he had offered as a matter of cooperation to produce any documents if the Government so desired.

Q That document -- no contract release dated June 28th was produced as a result of that conversation?

A That is correct.

Q Subsequent to that, there was a subpoena as you testified?

A Yes.

Q Now, did you serve that subpoena?

A I believe I did.

Q Didyou serve the subpoena on the custodian

of records of the McNamara re NuCars Incorporated?

A Yes.

Q Were documents produced pursuant to that subpoena?

A Yes.

Q Was Government's exhibit 16 or a -- was the original of Government's exhibit 16 or any copy of the original of Government's exhibit 16 produced pursuant to that subpoena?

A No, sir, there wasn't any copies produced of that contract release.

Q Now, during the week you executed the search warrant on the offices of Thomas McNamara, have you had prior occasion to serve any subpoenas in that building?

A Well, not precisely in that building. In the used car facility of that complex I served a subpoena on one of Mr. McNamara's employees, a Mr. Gniazdowski.

Q What type of subpoena did you serve?

A Forthwith subpoena.

Q To appear before a Grand Jury, is that correct?

A Immediately before a Grand Jury, yes, sir.

Q And on that occasion, during the course of your serving the subpoena and before Mr. Gniazdowski -- did you have occasion to see Mr. Timothy Shea?

A Yes.

Q What, if anything, did Mr. Shea do at that time?

A As I recall the incident, I was standing in the rear of the property behind the service facility. I was having a discussion at that time with John McNamara and also Alec Gniazdowski was present.

Mr. Shea arrived and said hello and walked up to Mr. Gniazdowski and said, "I understand you have a subpoena."

And Alec Gniazdowski showed Mr. Shea the subpoena.

Mr. Shea then said to Mr. Gniazdowski, "You have a right to consult an attorney before you answer that subpoena".

In interrupted and said, "It is a forthwith subpoena which commands him to appear right now."

Q You are not a lawyer? You don't know if that is, in fact, so, and Mr. Shea is an attorney?

A That is correct.

Q What, if anything happened next?

A Alec left in, I guess, in a car, he was driving a car, a stationwagon, I believe, going to the Eastern District of New York.

Q Did you subsequently have a conversation with me concerning Mr. Gniazdowski?

MR.LEONE: Your Honor, I object.

MR. GILLEN: Your Honor, this --

THE COURT: We are going far afield.

MR. RITCHIE: Can I give this as an offer of proof at the side bar? I want to explain myself.

(The following took place at the side bar:)

MR. RITCHIE: Your Honor, I bring this up -- I am not going to ask what the conversation was. All I am going to ask was , the fact he had a conversation he incorporated that in the search warrant.

THE COURT: Incorporated what in the search warrant?

MR. RITCHIE: The results of the conversation with me, okay? The reason I brought this up is oncross examination by Mr. Gillen, it was elicited by Mr. Gillen that Mr. McMullen was informed by Mr. Shea in fact, the contract release had been destroyed. And it is only within the context of a two month hiatus, and that statement can fairly be considered -- for two months, that document was sought and for two months that document was not

produced. It was only after the United States learned of the Notary that Mr. Shea made the statement and only after Mr. Gniazdowski appeared in the Grand Jury that Mr. Shea ever made that statement.

For that reason I think it is highly probative and relevant and it was opened up on cross examination by Mr. Gillen.

THE COURT: You mean at the last trial or --

MR. GILLEN: I don't understand.

THE COURT: I didn't follow part of it.

On his cross examination of Mr. Shea at the last trial?

MR. RITCHIE: At this trial he elicited the fact Mr. Shea said that he had --

THE COURT: It no longer exists, not that he had destroyed it.

MR. RITCHIE: It's only when, in the context of repeatedly non production for two months that the full scope of exfoliation is apparent. It's not as though we asked for it and were told right away that they destroyed it.

THE COURT: What did you expect of Mr. McMullen to say?

MR. RITCHIE: I expect Mr. McMullen to

say that he spoke with me and I told him of the conversation I had with Alec Gniazdowski, and he incorporated it into the search warrant, and he only learned of it --

THE COURT: Doesn't the warrant call for the contract release?

MR. RITCHIE: That is what it called for. The entire search warrant --

THE COURT: I haven't seen it.

MR. GILLEN: It called for the books and records, from what I understand.

THE COURT: Doesn't say contract release, does it? Does it?

MR. RITCHIE: I do believe it does, your Honor.

THE COURT: That's all I asked. I want to know specifically whether it says that.

MR. RITCHIE: I do believe it does. I can find the search warrant for your Honor and present it to your Honor for consideration.

THE COURT: I don't see what the use of this--

MR. RITCHIE: Does your Honor wish it?

MR. LEONE: I would like to voice an objection to this. Throughout this trial, Mr.

Ritchie has put himself in a position of being a witness in bolstering the credibility of the witness on the stand by saying, "Didn't you talk to me and didn't I tell you such and such, and didn't we do this and that." I think it is improper because of the amount of times it has happened in this trial. I don't think the Court should permit this.

MR. RITCHIE: In the ordinary case, the prosecutor wouldn't have gotten involved. In this case either, if the course of the investigation had not become --

MR. GILLEN: Personal.

MR. RITCHIE: It has been raised by Mr. Gillen on cross examination.

MR. IEONE: We had this throughout the trial.

THECOURT: We are getting so far afield.

MR. RITCHIE: It hasn't been --

THE COURT: All right, ask your questions.

MR. LEONE: I have an objection.

THE COURT: Reiterate it if you will on the record.

(The following took place in open court:)

Q Were you informed of what Mr. Gniazdowski had informed myself as the Government prosecutor?

MR. GILLEN: Objection.

THE COURT: Yes or no?

Q And then incorporated that in your search warrant affidavit?

A Yes.

Q Now, when, from whom did you learn that Alec Gniazdowski was the notary on the June 28th contract releasa?

A From yourself.

Q Who did the United States Government learn that from?

A Harold Goberman.

Q How long before April 18th had the United States Government learned that?

A Within a day or so, I believe.

Q Had you previously asked Harold Goberman the identity of the notary?

A Yes.

Q What had he said previously?

A He couldn't remember his name. He didn't recall. Only that he believed him to be an employee of the McNamara Buick Pontiac Company.

Q Now, Mr. McMullen, is the destruction of the contemporaneous notes --

Mr. Maiselman: Objection, your Honor.

MR. RITCHIE: Withdrawn.

Q What is the standard operational procedure with the FBI with regard to preparation of reports and maintenance of contemporaneous notes?

A The standard procedure is to interview someone, take notes, reduce your notes to writing in a typewritten form, and to review the typewritten form and report and if the notes are no longer necessary, to destroy them.

Q As a special agent of the FBI, do you have other duties other than interviewing witnesses?

A Yes.

Q AT times, at the request of a prosecutor, do you serve subpoenas?

A Yes.

Q Is it necessary at that time, according to your rules and regulations, to prepare reports of interviews?

A You can if you want to. I don't think there is any set requirement specifically with relation to subpoenas. It is up to the discretion of the agent. Sometimes it is done and sometimes it isn't. The agent feels that the execution of the bottom half of that

subpoena is enough to indicate that he has served that subpoena on the above named individual. Some agents do dictate 302's concerning the serving of subpoenas.

Q With respect to this interview of this service of a search warrant, what was your reason for preparing reports of interview on that date?

MR. MEISELMAN: Objection, if your Honor pleases.

THE COURT: I think that is an inference from what Mr. --

MR. RITCHIE: Yes, your Honor.

Q Approximately how many interviews have you prepared in connection with this case?

A It is difficult to state the exact --

MR. MEISELMAN: May I object? What is the relevancy?

THE COURT: Please, let's move along.

Q Now, in connection with your notes, do you write your notes in a narrative form?

A No.

Q What form do you write notes, contemporaneous notes that you subsequently destroy?

A I write phrases, sentences, sometimes just individual words I consider to be key words to refresh

my recollection during the time of dictating or preparing of the typewritten form.

Q Now, are there time requirements on the preparation of a report of interviews?

A Yes.

Q What are the time requirements?

A The report of interview must be dictated to a stenographer within 5 working days from the date of the interview.

Q Are there further time requirements?

A Yes, the administrative requirement that the stenographer who takes the dictation should prepare that dictation in typewritten form within 5 days from receipt of the agent from whom she got the dictation.

Q Besides the original report of interview, are there copies?

A Yes.

Q Those are the exactduplicates?

A They are carbon copies of the original.

Q In connection with this type of investigation where, if anywhere, are copies sent?

MR. FISCHETTI: Objection.

THE COURT: Overruled.

A Well, in connection with this type of

investigation, copies of our interview are sent to our headquarters in Washington, D.C., to whoever oversees and supervises a case; copies sent to the United States Attorney's office or strike force attorney's office; copies may be sent to other field divisions outside of New York if there is an investigation being conducted, we sent copies of pertinent information so they can conduct their investigation.

Q Now, how was it investigation -- how was it initiated?

A How was it initiated?

Q Yes.

MR. GILLEN: I object. We had testimony about that.

MR. RITCHIE: I believe it was brought out on cross examination.

THE COURT: I believe he was asked whether the interview with Mr. Goberman on August 28th was the first step in the investigation.

MR. GILLEN: The question was, when was the first time you spoke to Mr. Harold Goberman about this case and that was it.

THE COURT: You may inquire.

Q How was this investigation initiated?

A This investigation was initiated in the following manner: I was in myoffice during the normal course of a business day prior to August 28th --

MR. LEONE: I object. If there is going to be conversation I object to it. It is going to call for hearsay.

THE COURT: All I want to know is in answer to this question, was it initiated on the complaint of a person?

A Yes, sir, it was.

Q Was that complaint made to yourself?

A Originally, no.

Q To whom?

A Dennis Dillon, an attorney with the Government.

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Q How did you personally become aware of this complaint?

MR. LEONE: Objection.

THE COURT: It doesn't matter.

Q Subsequent to your becoming aware of this complaint made to Mr. Dillon, what was your first step in the course of this investigation?

A Interview Harold Goberman.

Q Subsequent to your interview of Harold Goberman, did you make checks on his background?

A Yes, I certainly did.

Subsequent to the interview of Harold Goberman within a relatively short period of time, a day or so, I had searched for my, by our clerical staff of the New York office, the records of files contained in the New York office for any and all information pertaining to Harold Goberman on file in our office.

Upon receipt of the form that we used indicating there were files in which Harold Goberman's name was mentioned, I had it delivered to my desk those files in which Harry Goberman was mentioned and I reviewed those files.

I also had read every word that is on file in the Suffolk County Police Department pertaining to

Harold Goberman.

Additionally, our headquarters office in Washington, D.C. informed me by letter -- of course the headquarters office didn't know -- it is a double check, they informed me Harold Goberman is mentioned in the New York files and they will set out what files they know he was mentioned in to make sure I know what is in the files, or to review them.

Additionally, from the identification bureau of the Suffolk County Police Department, I obtained a copy of Harry Goberman's arrest record.

Q When, for the first time, did you learn that Harold Goberman had testified in the murder trial that was referred to previously in the case?

A Subseuqent to Mr. Goberman being interviewed and I can't specifically fix a date, but in September of 1972, while I was conducting other business of a personal nature, I met an individual who is a -- now a judge in Suffolk County, and I asked him if he knew -- I knew that he had also been a former Assistant United States Attorney, and also a former assistant District Attorney in that county, and I asked him if he knew the name of Thomas McNamara and the name of Harold Goberman.

He said yes.

Q What did he say about Mr. Goberman's relationship to the murder trial?

A He said that Harold Goberman --

MR. GILLEN: I object.

THE COURT: I think not, Mr. Gillen. Overruled. This is in September of 1972 as I understand it.

THE WITNESS: Yes, sir, I believe either September or early October of 1972. He suggested that I contact the District Attorney's office or the Suffolk County Homicide Squad for information pertaining to Harold Goberman, that he was involved or had been under investigation by those offices.

Q After learning of Mr. Goberman's arrest sheet, did you then inform any individuals in the department of justice about that?

A Yes, sir. If you want to include the FBI as an organization within the Department of Justice.

Q Do you normally do that --

A No.

Q I am talking now about the prosecutor's arm.

A As far as the prosecutor's arm of the Department of Justice, I informed you personally of Harry

Goberman's arrest record and information I obtained from the Suffolk County Police Department.

Q Did you inform anybody else in the Department of Justice?

A I informed Dennis Dillon. I had a discussion with him concerning this.

Q Did you -- concerning the murder trial, there is testimony in the murder trial -- did you inform anybody in the Department of Justice of that fact?

A Yes, I informed them he had been granted immunity in the murder trial and had testified in State Court concerning his participation in that trial.

Q Was that prior to indictment?

A Yes.

Q Are you certain that you informed us that he received immunity?

A (No response.)

Q Are you certain that you informed the Department of Justice that he received immunity in connection with that?

A Yes, I am fairly certain. Although, at the time when I found out he had been granted immunity, I think there was some question I couldn't find out specifically what immunity he had been granted. In a

general term, I think I stated he had been granted some sort of an immunity and testified for the people of the State of New York.

Q You had informed individuals in the Department of Justice about his having testified?

A Yes, sir.

Q Now, what was your reason for not asking subcontractors if they ever heard Harold Goberman threaten Thomas McNamara?

MR. MEISELMAN: Objection, your Honor.

THE COURT: Overruled.

A It was my opinion at that time that if there were any witnesses to Mr. Goberman threatening Thomas McNamara, Mr. McNamara would have produced their names during the interview of February 15, 1973. I asked that question several times during the interview, were there witnesses, and the answers were, "No, there were no witnesses."

Q Now, when did Harold Goberman first tell you that he was associated with Salvatore Spatsarella?

A August 28, 1972, the date of the first contact with Harold Goberman, the date I first met Mr. Goberman, he told me he was an associate of Salvatore Spatsarella.

Q Do you have any indication in your report

that he told you that?

A Yes, sir, it is indicated in my report of interview.

Q What did he tell you about Salvatore Spatsarella at that time?

A He considered him his Rabbi.

Q What did he say about Salvatore Spatsarella's activities?

A Well, he alleged that he was a racketeer, if I can use that broad term.

Q Now, with respect to what Harold Goberman told you about the events on June 28th after he left the police station -- did Mr. Harold Goberman ever tell you who picked him up, if anyone, at the police station?

A Yes, sir.

Q When was that?

A I don't recall the exact date. I don't recall the exact date when he told me that. It was subsequent to the interview, I believe.

Q Who did he tell you had picked him up?

A From the police station or from police headquarters?

Q From police headquarters.

A He was picked up by his attorney, Emanuel

Cefalus. I recall he told me that sometime long after the initial interview.

Q At this time, do you recall when Mr. Cefalus was first contacted by the FBI?

A No, I don't recall the exact date.

Q Had he been contacted prior to the commencement of the first trial?

A No, sir, he had not been.

Q If you know -- withdrawn.

Did Mr. Goberman ever indicate to you that he hadn't -- wasn't sure who had picked him up?

MR. FISCHETTI: Objection, your Honor. That has already been testified to.

THE COURT: I don't know what the purpose of all this is. I think we are very far afield from the things the jury is interested in.

Q At the time of the initial interview with Mr. Goberman about threats directed toward him by Mr. McNamara, did he supply to you the name of witnesses who could bear him out?

MR. MEISELMAN: Objection.

THE COURT: Overruled.

A Yes.

Q At the time of your intial interview of

Mr. McNamara concerning threats by Mr. Goberman, did he supply you with the name of any witnesses who could bear him out?

MR. MEISELMAN: I object. That has been asked and answered.

THE COURT: Asked and answered.

MR. RITCHIE: I have no further questions.

RECROSS EXAMINATION

BY MR. GILLEN:

Q Would you tell us, please, which of your 302's, if any, reflect these conversations you say you had with Mr. Shea prior to --

A Which of these?

Q Prior to February 15, 1973.

A No, sir, it is a matter of policy, there are no 302's -- it is a matter of policy not to dictate on hearsay evidence which has no probative value.

Q You mean you select what you believe to be the evidence, is that your testimony?

A No, sir, I don't select. I know, in this particular instance, which Mr. Shea appeared in Mr. Ritchie's office, it was a meeting he was representing Mr. McMullen.

What Mr. Shea said Mr. McMullen said to Mr. Shea is hearsay.

Q So we don't misunderstand each other, I am talking about your testimony that Mr. Shea allegedly said to you that Harold Goberman never signed any release except a release of a mechanic's lien. Where is the report on that?

A There is no report.

Q Where arethe notes?

A There are no notes on that.

Q Incidentally, you say your notes are destroyed according to policy after the report is produced, right?

A Yes.

Q After it is dictated?

A Not after dictating.

Q After it is compared for accuracy?

A Yes, sir.

Q Isn't it a fact that you know, Agent McMullen, if those notes were in existence, I could demand them in this court of law?

A Yes, it is a fact.

Q Isn't that the reason the notes are destroyed, so the defense counsel can't demand them in the court of law?

MR. RITCHIE: Objection, your Honor.

THE COURT: Overruled. If you know the answer --

A I do not know that. This is FBI policy. I do not dictate FBI policy, I just follow rules.

Q You just follow orders?

A Yes.

MR. RITCHIE: I object, that is argumentative.

THE COURT: Yes.

Q You told us you gave us your opinion that at the time of the interview with Mr. McNamara, I am not sure of your exact words, you said your opinion at that time that if there were any witnesses, Mr. McNamara would have told you; is that right?

A I believe words to that effect, yes, Mr. Gillen.

Q In your opinion, from all your investigation in this case, did Harry Goberman threaten Thomas McNamara during the construction of this building?

MR. RITCHIE: Objection, your Honor.

THE COURT: Sustained, of course.

Q Did you ever investigate to determine whether or not Sal Spatsarella described as a racketeer by Harry Goberman, presented himself at this job site?

A Did I ever investigate?

Q Yes.

A Yes.

Q What did you do to investigate that?

MR. RITCHIE: Objection. That is beyond the scope of redirect.

THE COURT: Overruled.

A I interviewed Salvatore Spatsarella.

THE COURT: I'm sorry?

THE WITNESS: I interviewed Salvatore Spatsarella.

Q Did you interview any other people that were working in and about that job site to determine whether Sal Spatsarella was on the job site?

A No, sir. In fact --

Q I have my answer. There is no question, Mr. Witness.

Have you ever been involved in a case before when you spent so much time with the assistant on a case?

MR. RITCHIE: Objection, your Honor. It's irrelevant.

THE COURT: Sustained.

MR. GILLEN: I have nothing further.

MR. FISCHETTI: May we have just one moment, your Honor?

(Pause.)

MR. FISCHETTI: I have no questions.

MR. LEONE: I have no questions.

MR. RITCHIE: I have one question.

REDIRECT EXAMINATION

BY MR. RITCHIE:

Q What was the reason that there wasn't a report of interview prepared with respect to that initial conversation with Timothy Shea?

MR. GILLEN: Your Honor, I think the witness has already testified as to that.

THE COURT: He testified fully.

MR. RITCHIE: Well, then, I will withdraw the question, your Honor.

I have no further questions.

THE COURT: You are excused.

(Witness excused.)

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MR. RITCHIE: The Government calls as its next witness Mr. Emanuel Sfaelos.

E M A N U E L G. S F A E L O S, called as a witness on behalf of the Government, having been duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. RITCHIE:

Q Mr. Sfaelos, what is your occupation?

A I am an attorney.

Q And how long have you been so employed?

A 1960.

Q And what is your educational background?

A Davison College, and --

MR. LEONE: I think defense counsel will stipulate.

MR. RITCHIE: I will withdraw the question.

Q You are an attorney at law? And you have been so since when?

A 1960.

Q And you have been practicing in the State of New York; have you not?

A Yes.

Q Now, do you know an individual named

Harold Goberman?

A Yes, I do.

Q And have you ever represented that individual?

A Yes, sir, I have.

Q On how many occasions?

A In matrimonial actions that he was involved in and in actions with HarMac Construction Company, Thomas McNamara, Radiocar --

Q When did you first represent Mr. Goberman with respect to the construction of the New McNamara building?

A I believe the contract or the negotiations were in the early part of 1972, I can't remember the exact month, probably, say, around March, somewhere in the early part of '72 the contract was signed.

Q And you took part in those contract negotiations?

A Yes, sir.

Q And did you continue to represent Mr. Goberman after the building contract had been signed?

A Yes, I did.

Q And were you representing Mr. Goberman on June 28, 1972?

A Yes, I was.

Q On that date, did you have occasion to hear from Mr. Goberman?

A Yes.

Q And how did you first hear from Mr. Goberman?

A A telephone call to my office which either I or my secretary answered, but I eventually spoke to Mr. Goberman at that time, and that is how I heard from him on that day, and he told me he was in the intelligence section of the police department, I believe, or was being held by the police department of Suffolk County and would I come down.

Q And did you subsequently go to the Suffolk County Intelligence headquarters?

A Yes, I did.

Q And while you were there, did you see Mr. Goberman?

A Yes.

Q And do you recall what time of day you received the telephone call?

A Late morning, I believe late morning-early afternoon, something like that.

Q And how soon after you received the

telephone call, did you arrive at the Suffolk County police headquarters, intelligence section?

A I would say within a half hour, 45 minutes.

Q And when you got there, did you see Mr. Goberman?

A Yes, I did.

Q And how soon after you got there?

A I would have to -- Let's -- Let's see, I would say about a half hour, 15 minutes, a half hour. It could have been longer, but it was sometime, an interval between the time I requested to see him and the time I saw him.

Q You saw him?

A Yes, sir.

Q And when you saw him, did you have occasion to observe his clothing?

A Yes.

Q And can you describe anything unusual which you noticed about his clothing at that time?

A My recollection was that he had a tear in the jacket, the suit jacket, I believe it was the left shoulder of that jacket.

Q And after you first saw Mr. Goberman, did you have occasion to leave the building with him?

A Yes.

Q And where, if anything, did you proceed to after leaving the building?

A I took Mr. Goberman to my car and drove him to LenAl Contracting, LenAl, the house that LenAl contractors operated from.

Q And did you have occasion during or after your left the police station to observe how Mr. Goberman was walking?

A Yes, he was limping.

Q And did you ask him about that?

MR. GILLEN: Objection, your Honor.

THE COURT: No, he may answer.

A Well, yes, I asked him basically what happened.

Q And what, if anything, did he say?

MR. FISCHETTI: I object to that.

THE COURT: Overruled.

A He said words to the effect that some goons had done a job on him and compelled him to sign a release.

Q And did he say where this had happened?

A At McNamara's office.

Q And on that occasion in whose car did you

to LenAl Contractors?

A In my car.

Q And did you walk to the car from the police station?

A Yes.

Q Did Mr. Goberman walk on his own or was he assisted in any way?

A I assisted Mr. Goberman to the car.

Q What precisely did you do?

A I believe I put his arm over my shoulder and supported him as he walked. He requested assistance and I gave him assistance.

Q Now, during the course of your representation of Mr. McNamara -- of Mr. Goberman, did you ever have occasion to meet or speak with Thomas McNamara?

A Yes.

Q And you recognized that individual in this courtroom, don't you?

A Yes, I do.

Q And can you point him out, please?

MR. MEISELMAN: The identification has been conceded, your Honor.

Q And prior to June 28th, when had been the last occasion that you had spoken with Mr. Thomas McNamara?

A The day prior, I would say the 26th or 27th, within that time span.

Q And how had you spoken to Mr. McNamara?

A By telephone.

Q And during the course of that telephone conversation, what if anything did you say and what if anything did Mr. McNamara say?

MR. MEISELMAN: Objection, your Honor.

THE COURT: No, no. You may answer.

THE WITNESS: If I may give some background on that, your Honor, or just the words --

THE COURT: No, I think the jury probably knows enough background.

You will state the content of the conversation.

A My best recollection of it, Mr. Ritchie, was that I told Mr. McNamara in that conversation, that the matter would have to go into arbitration or the Supreme Court to be resolved, and that Mr. Goberman would not voluntarily get off the job.

Q Now, have you ever represented Thomas McNamara in any course of action or in any legal situations, sir?

A Yes.

Q In connection with what?

A The sale of a parcel of real estate in Port Jefferson.

Q And when did you enter into this representative capacity with regard to Mr. McNamara?

MR. MEISELMAN: Your Honor --

THE COURT: This seems to be wholly besides the point.

MR. RITCHIE: Then I will withdraw the question, then, your Honor.

I have no further questions of this witness at this time.

Oh, may I, may I just ask one?

BY MR. RITCHIE:

Q At the time you received this call from Thomas McNamara with regard to your representation of Mr. Harold Goberman, were you, at that time, representing Mr. McNamara in another capacity, in connection with the sale of that land in Port Jefferson?

A That real estate transaction, yes.

MR. RITCHIE: I have no further questions.

MR. MEISELMAN: Your Honor, may I respectfully request a recess for a few moments?

THE COURT: Yes, all right.

We will have a short recess, ladies and

gentlemen; don't discuss the case with one another or with anyone not on the jury until it is given to you to decide.

(At 3:07 P.M. the jury left the courtroom.)

(At 3:25 o'clock P.M. the following occurred in the absence of the jury:)

THE COURT: Will you come forward, please, Mr. Shea.

MR. SHEA: Your Honor, I have been out in the corridor for two days --

THE COURT: I am sorry.

MR. SHEA: I have been out in the corridor with my secretary for two days and my office schedule has been disrupted greatly, and if one of us could get back to the office just to mind the store, I would appreciate it, and if we could have myself appear this afternoon -- my secretary was just let go to go home, she just left --

THE COURT: Well, I don't -- I should not think that Mr. Sfaelos is going to be examined for very long.

MR. SHEA: I have just been informed that Mr. Ritchie has two witnesses whom he intends to put on before me.

MR. RITCHIE: Your Honor, they have also been waiting for two days, these are two minor witnesses.

THE COURT: Let us hurry up and get them done.

MR. RITCHIE: I had intended to start with Mr. Shea, I apologize for the delay, there are a number of reasons which made it necessary to deviate from what I considered to be the actual schedule.

THE COURT: You see, you weren't here at 10 o'clock when we were willing to start with you, and we took Mr.McMullen, and he took a great deal more time than anybody thought.

MR. FISCHETTI: Your Honor, I have a hearing before Judge Platt at 4:30.

THE COURT: It will be 4:30 if we don't get on with this.

MR. FISCHETTI: If I were to leave at 29 minutes after 4, Mr. Gillen will cover, is that all right?

(The jury then took its place in the jury box.)

CROSS EXAMINATION

BY MR. MEISELMAN:

Q Mr. Sfaelos, my name is Leonard Meiselman, I am co-counsel with Mr. Gillen for Mr. McNamara.

Mr. Sfaelos, do you have a file concerning--

THE COURT: I beg your pardon?

MR. MEISELMAN: Sir?

THE COURT: Go ahead, sir.

Q Do you have a file concerning the matter of Harold Goberman and/or HarMac with reference to the construction of a building on Nesconsett Highway?

A No, I don't, sir.

(continued next page.)

Q Do you have such a file in your office?

A No, I don't, sir.

Q Have you ever kept a file concerning that?

A Yes, I did, your Honor -- excuse me, yes, sir, I did.

Q Where is that file, Mr. Sfaelos?

A Another firm of attorneys, I believe in Garden City or Mineola, took over the matter when I did not want to become involved in any litigation with Mr. McNamara.

Q So that all your papers, everything, was turned over to these other attorneys; is that right?

A Yes, whatever was in that file, yes, sir.

Q Including any notes you may have made?

A Except in the diary in my office, my office diary, if that is what you mean by notes.

Q Other than your office diary --

A Well, as far as appointments --

Q Your office diary would have appointments and that would be it?

A Appointments, yes, sir.

Q But if you made notes concerning telephone conversations or meetings or what had occurred on this specific date, that would have been in your file; is

that right?

A It could have been in both, sir.

Q Do you know the firm of Kantor, Plotnick and Haber?

A Yes, sir.

Q And is that the firm that you turned over your entire file to?

A Yes, sir.

Q Now, when you testified today you are testifying completely from your recollection; is that correct?

A Yes, I would say yes, sir, my best recollection

Q Now, before coming to court at any time did you speak with anyone concerning the testimony you may be called upon to give here today?

A Yes, I did.

Q With whom did you speak, sir?

A I spoke to Mr. Ritchie.

Q And did he go over with you the facts that he wanted to elicit from you?

A No, he did not, sir.

Q He did not go over any facts at all?

A Yes, we went over facts.

Q Oh!

And did he show you any testimony?

A Did he show me testimony?

Q Yes, sir.

A No, he did not show me testimony.

Q Did he show you any written papers?

A No, he didn't show me written papers.

Q Did he tell you what testimony or written papers may contain?

A Are you referring to my testimony, sir, if I --

Q Yes, the testimony you are giving here today, did you discuss any of that testimony with Mr. Ritchie?

A Oh, yes, I said that I did.

Q And did Mr. Ritchie tell you what some testimony or written papers may contain in discussing this with you?

A I don't understand, are you referring to my prior testimony?

Q Any testimony whether yours or anybody elses, did you discuss that?

A My prior testimony, yes, I have a copy of my prior testimony.

Q I see.

And you read that?

A Yes, I did.

Q When did you read that, in Mr. Ritchie's office?

A No, as a matter of fact I read it in my office, sir.

Q Now, did you ever discuss this case and your coming here with Mr. Goberman, Harold Goberman?

A He knew that I was coming here, yes.

Q Sir, did you discuss your coming here with him?

A No.

Q When is the last time you saw Harold Goberman?

A This is, I would say, about 20 days ago, roughly, sir, 20 to 25 days ago.

Q Now, about 20 or 25 days ago, did you spend a considerable amount of time in his presence; did you not?

A Yes, sir.

Q Did you, at any time while you were in his presence, at that time, discuss with him in any way, either what his testimony was or what yours would be in the event you were called to testify?

A No, sir.

Q Never?

A Not in the past 20, 21 days ago, 25 days.

Q How about shortly before that, did you discuss it with him?

A No, sir.

Q Well, does Mr. Goberman -- withdrawn.

I believe you testified that you rendered substantial services on his behalf as an attorney?

A Yes, sir, I did say that.

Q Does Mr. Goberman owe you any money?

A Yes, he does.

Q Will you be good enough to tell us how much?

A I believe the balance is $5,000, sir.

Q Now, in turning over this file to Kantor, Plotnick & Haber, did you have any arrangement with that firm as to a percentage of fees or work performed with respect to an action against Mr. McNamara for some million and odd dollars?

A No.

Q Nothing at all?

A None at all in regard to that, sir.

Q Who, in that firm, did you have a talk with about this case?

A In that firm?

Q Yes, sir.

A About this trial pending?

Q Yes.

A No one.

Q How about the action against Mr. McNamara for some millions of dollars, did you discuss that with anyone in that firm?

A No, I did not, sir.

Q Did you have any discussions prior to delivering the file to them?

A I might have, certainly they were going to come and pick up the file, yes, sir.

Q Did you have any authorization in writing from Harry Goberman to deliver the file to Kantor, Plotnick & Haber?

A I would assume no, I think -- he told me that they had taken the file and that is fine.

Q Did you ever have in your possession any of the bank accounts or checkbook or payroll book of HarMac; is that correct?

MR. RITCHIE: Objection, your Honor.

THE COURT: He may answer.

A I did to my best recollection, sir, I had

cancelled checks and bank statements for the period of time Mr. Goberman was on the job.

Q I believe my question, Mr. Sfaelos, was: Did you have any of the books of account including the checkbook and the payroll book?

A Well, sir, I've tried to answer your question fairly.

Q Did you have --

THE COURT: I think he means strictly.

A I did not have the payroll book, I did not have a payroll book, I did not have a book of accounts -- what was the other book you mentioned, sir?

Q The checkbook.

A The checkbook, I might have had, if you take it to mean in relation to the cancelled checks.

Q I'm talking about the checkbook.

A The book itself?

THE COURT: The book of stubs.

A No, I don't believe so.

No, sir, I don't believe I did.

Q Now, sir, does your office maintain any system where telephone calls are listed as they come in?

A No, sir, no formal record of that, no.

Q You don't time either the call or from whom

it came in at any given time?

A No, sir.

Q Do you recall Mr. Goberman speaking to you on the telephone and in substance asking you to come to the police station, or was that a message that you received?

A No, I spoke to him personally.

Q On the telephone?

A Yes, sir.

Q And he asked you to come to the police station?

A Yes, he did.

Q Now, when you got to the police station, Mr. Sfaelos, where was Mr. Goberman in that building when you first observed him?

A I believe he was being brought down a corridor in the new building, in the intelligence section of the Suffolk County Building.

Q Do you know who was with him?

A They were not uniformed but two --

Q Do you know who they were?

A The names of the individuals, no, sir.

Q Yes, sir?

A I don't know.

Q Have you ever seen them since?

A No.

Q Did you have occasion at that time to observe Mr. Goberman?

A Yes, I did, sir.

Q And will you tell us, sir, if you remember, what he was wearing?

A I believe the first time I saw him, sir, he was wearing a pair of pants to a suit and a shirt and I believe he -- I can't recall if he had a tie on or not, I don't recall.

Q Now, with respect to the pants and the shirt and the tie, did you observe anything about it that would stay in your memory?

A Just, you know, later the jacket, I saw the jacket and the jacket, to my best recollection, was torn.

Q Were the trousers torn?

A Not that I recall, sir.

Q Was the shirt torn?

A Not that I recall, sir.

Q Was the tie torn?

A I said I don't recall if he had a tie or not.

Q The tie, shirt and trousers, you say, looked

normal to you?

A I don't understand that question, sir, I don't know what you mean by normal, and I'm not trying to be --

Q Was there anything abnormal about the shirt, tie and trousers?

A Other than the fact that the jacket -- wait a minute, wait a minute, the shirt, tie and trousers, no, I can't say that there was anything abnormal about them.

Q Did there come a time when you saw Mr. Goberman with a jacket?

A Yes.

Q Where was that, sir?

A As we left the station.

Q As you left the station, did Mr. Goberman put on his jacket?

A Either in the station or on the way out.

Q He put it on?

A Yes, sir.

Q And when he put it on, what did you notice, if anything, about the jacket that was out of the ordinary?

A The shoulder was ripped.

Q Which shoulder?

A I believe it was the left shoulder, sir.

Q Now would you please indicate to his Honor and the jury, to your best recollection, where this rip was?

A I would say it would be, you know, here in the -- what would you call this part of the jacket (indicating), I am not a haberdasher.

Q You are indicating --

A The left shoulder, the top of the jacket, where it meets with the sleeve.

Q You are indicating this (indicating)?

A That is correct, the -- between the arm and the shoulder bone, here on the end (indicating).

Q Outside here, am I pointing correctly (indicating)?

A No, it is on the top, the material portion, the padding on the shoulder.

Q And that was torn?

A Yes, sir.

Q How big a tear would you say it was?

A It was torn so that it was a noticeable tear, I would say -- I can't be too approximate, I don't accurately recall it, I know it was a visible tear.

Q If you find difficulty in approximating it in inches or whatever it may be, could you indicate it this way (indicating) or this way, if I may indicate to the best of your recollection?

A Would you like an approximation, sir?

I would say four inches.

Q A four inch tear?

A Yes.

Q That would be approximately from here to here (indicating)?

A No, no, it would be --

Q Smaller?

A You are indicating the improper area of the tear.

Q Indicating here to here (indicating)?

A That is about right, yes.

Q Did Mr. Goberman call it to your attention?

A No, he did not.

Q Was it a warm day?

A I can't recall the temperature, sir.

Q Were you wearing a jacket?

A Yes, I was.

Q Now, to the best of your recollection, Mr. Sfaelos, approximately what time of day did you arrive at

the police station on June 28th?

A It was late morning-early afternoon that day, sir, somewhere, as I said, as I testified earlier, between 12 and 2. I reached much earlier than two, but it was in the late morning-early afternoon at the police station when I arrived.

Q Now, prior to June 28th, when is the last time you spoke with Mr. Goberman, Harold Goberman?

A I would say the day prior.

Q And after June 28th, when is the next -- withdrawn.

After this first time that you say you met Mr. Goberman at the police station and took him to LenAl's office, did you see him again that day?

A That day, no.

Q Did you see him again the next day? June 29th?

A I could have, I can't be sure.

Q Well, do you have any recollection, do you have any records as to whether you saw him on June 29th?

A I might in my office diary, sir, indicated whether I had an appointment, but I know I was seeing Mr. Goberman during that period of time so it is quite possible that I did.

Q Had you discussed with Mr. Goberman immediately prior to June 28th, within a matter of days, the receipt of a document by Mr. Goberman from the McNamara Rental Cars, terminating this contract for the construction of the building?

A No, sir.

Q Had you seen such a letter?

A A letter?

Q Yes.

A No, I don't recall seeing such a letter, sir.

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Q To your knowledge, then, as far as you know, Mr. Goberman never showed you a letter terminating this contract?

A Yes, sir.

Q Did you ever prepare a letter on behalf of Mr. Goberman wherein Mr. Goberman terminated the contract?

A I don't believe I did, sir.

Q Well, do you know, sir, or not?

A I do believe, if I did, it would be on my stationery and I don't recall ever preparing such a letter.

Q Did you ever prepare a letter on a blank letterhead addressed to Thomas McNamara which in substance terminated the contract?

A No, sir.

Q Do you know if Mr. Goberman was represented by any other counsel at that time?

A I don't, sir.

Q As a matter of fact, Mr. Goberman was represented by other counsel at that time and you are aware of it, are you not, sir?

A No, sir.

Q Did you ever hear of the firm of Joyce & Malloy in Smithtown?

A Yes, sir.

Q They were Mr. Goberman's lawyer at that time, weren't they?

A Not to my knowledge, sir.

Q Mr. Goberman never told you this?

A No, sir.

Q Did you ever have any correspondence with Joyce & Malloy on behalf of Mr. Goberman?

A I believe there is correspondence from Joyce & Malloy concerning Mr. Goberman, yes.

Q And concerning their representation of Mr. Goberman?

A In this matter, sir?

Q Let us say first, there is correspondence that you saw.

A Yes, I would say that there is correspondence, yes, sir.

Q Yes.

And you have that in your file?

A Which file, sir?

Q The file you turned over to Kantor, Plotnick & Haber?

A Not concerning this matter, sir.

Q I see, but putting this matter aside for the

moment, do you know that Joyce & Malloy were counsel to Mr. Goberman at the same time that you say you were counsel to Mr. Goberman?

A No, I don't know that they were counsel at the same time that I was counsel.

Q Give or take a few days?

A I don't know, I'm not aware of any representation by them, sir, give or take a few days.

Q No representation by them, but did you have any correspondence in your folder which in words or in substance, indicated to you that Joyce & Malloy were representing Mr. Goberman?

A No, I don't recall such correspondence at all, sir.

Q But you do recall correspondence from Joyce & Malloy?

A Yes, I have seen letters from Joyce & Malloy.

Q Isn't it a fact, Mr. Sfaelos, that if you had a conversation with Mr. McNamara on the 27th it was with reference to defendant's exhibit AQ in evidence, which I now show you.

(Document handed to the witness.)

THE WITNESS: Can you repeat the question

now, sir?

MR. MEISELMAN: Mr. Reporter, would you please repeat it?

(The reporter repeated the question.)

A No, sir.

Q And you now state, sir, that you never saw either that letter or the original or a copy thereof, and you did not know of its existence, is that correct, is that a fair statement?

A On what day, sir?

Q In or about June 28th?

A No, sir, I don't recall seeing this document prior to this time.

Q Never saw it before?

A I don't recall seeing it, sir, this is the first time I saw it.

Q Would your file refresh your recollection?

A It probably would, sir.

Q And you knew that you were coming here today to testify concerning a relatively important matter?

A Certainly.

Q Did you have an opportunity if you wished to look at your file to refresh your recollection?

A Maybe I could have gone to that firm of

attorneys and looked through the file, I don't know, sir.

Q But you didn't, Mr. Sfaelos, did you?

A No, I didn't.

Q Did you represent Mr. Goberman in February of 1972?

A I would say that is a fair statement, yes, sir.

Q And did you represent him with reference to the negotiations of a stockholders' agreement in LenAl Corporation?

A I believe I did, yes.

Q Atthat time there were negotiations between Harold and Allen and Helen Goberman concerning a stockholder agreement between the three of them in LenAl; is that correct?

A Yes, there were conversations.

Q Because Harold was a stockholder in LenAl, whether of record or not; isn't that so?

A I don't know, sir.

Q And yet you represented him on these negotiations? And you don't know that?

A I don't believe he was a stockholder, sir.

Q Well, I am not asking you what you believe, do you know?

A Well, whether he was or was not a stockholder? Was he not, as a matter of fact, a stockholder, not of record?

A I don't believe that is legally possible, sir.

Q You don't believe that people can make an agreement among themselves as to what their status may be irrespective of any written documents or the issuance of stock?

MR. RITCHIE: Your Honor, I'm going to object --

A Certainly.

MR. RITCHIE: I'm going to object on the grounds of relevancy.

THE COURT: Well, well, it is besides the point.

Q They can make, you have seen such agreements?

A Of course they could make such agreements.

Q And wasn't there an agreement between them in February 1972?

A Not according to Allen and Helen.

Q According to Harold, wasn't there such an agreement?

A Did he make such an agreement?

Q Wasn't there such an agreement?

A No, there was no such agreement.

Q I see.

Did Harold ever tell you that Thomas McNamara -- withdrawn.

That he was like a son to Thomas McNamara?

MR. RITCHIE: Objection on the grounds of relevancy, your Honor.

THE COURT: Overruled.

MR. RITCHIE: Objection, then, on hearsay.

THE COURT: He may answer.

A Did Harold Goberman ever tell me that he was like a son to Thomas McNamara, he might have, sir.

Q Can you tell us to the best of your recollection, when Mr. Goberman might have said such a thing to you?

MR. RITCHIE: Objection, your Honor.

THE COURT: Overruled, Mr. Ritchie.

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A At the time, on or about the time when the contract was originally to be signed or entered into, I would say, you know, within a couple of weeks of that initial signing of the contract.

Q Did you call Thomas McNamara or did Thomas McNamara call you?

THE COURT: When was this.

MR. MEISELMAN: On June 27th, sir.

A I believe I received a call from Mr. McNamara, sir.

Q Did he tell you that there were negotiations concerning the termination of this contract?

A No, sir.

Q He never said anything at all about that?

A That there were negotiations for termination, no.

Q In words or in substance?

A No, sir.

Q That the contract was to be terminated?

A Oh, yes, he told me he wanted Harry off the job.

Q Right, and did he in words or in substance say that there were discussions about that?

A No.

Q Never said anything like that to you?

A No, sir.

Q And your reply was in substance, "Never, it will be in Court"?

A Wrong.

Q Or in arbitration?

A Well, you can culminate it with that, it would have been arbitration or put into the Supreme Court and a lien filed by Mr. Goberman or Harmac Construction, yes, sir.

Q Now, sir, you represented Mr. Goberman in the first week of July 1972?

A It's possible I did, yes.

Q Well, you represented him on July 29th, don't you remember whether you represented him in the first week of July?

MR. RITCHIE: Objection, that is not the testimony.

MR. LEONE: July, July?

MR. RITCHIE: June.

MR. MEISELMAN: I beg your pardon, I beg your pardon, representing him on July 28th.

THE COURT: June 28th.

MR. MEISELMAN: Again I apologize, June 28th.

A Yes, sir, I did.

Q Yes.

On June 29th did you represent him?

A Yes, sir.

Q How about July 6th?

A It is quite possible if that is not a Saturday or Sunday.

Q Now, sir, now did you on July 6th prepare a mechanic's lien on the premises that were under construction?

A I don't believe I did, sir.

Q But you were Mr. Goberman's lawyer, weren't you?

MR. RITCHIE: Objection, argumentative.

THE COURT: Just asked.

Q You know nothing about the filing of a mechanic's lien?

A I don't believe I do, sir.

THE COURT: If you have a copy of that, show it to him and then he may answer.

BY MR. MEISELMAN:

Q When did you turn over your file to Kanter, Plotnick and Haber?

A I don't recall that, sir.

Q Can you give me the month?

A No, I don't believe I can.

Q Was it in August, to the best of your recollection?

A It could have been, sir, it could have been

before that.

Q Now, had you been in discussion with a Mr. Desmond O'Sullivan on the question of payments?

A Yes, sir.

Q And did Mr. Desmond O'Sullivan deliver money to you for use on this job?

A Yes, he did.

Q How much did he give you?

A He gave me a check in this period in June, I would say about the middle of June --

Q Yes?

A -- for a requisition that had been approved on this job by the architect, whoever the architect happened to be at that time.

Q Do you know who the architect was at that time?

A That was one of the problems --

Q Yes, sir, I know.

A There was a substitution of architects about that time and --

Q I know --

A I believe it was Romeo who was coming in and there was a previous guy that had approved some requisition, a May requisition, if I recall.

Q And you received money under that requisition?

A Yes, I did.

Q Out of that requisition, how much money did you keep?

A I don't remember, I think it was probably somewhere around a thousand dollars, if I recall, $1,500 maybe, I don't remember exactly.

Q Was that the only requisition you kept money from?

A Yes, sir.

Q For yourself?

A To the best of my knowledge, yes, sir.

Q Did you have correspondence with Mr. O'Sullivan concerning this matter?

A I'm sure there is correspondence in the file, yes.

Q And you don't have that?

A No, sir, it would be with the file.

Q Did you have any escrow documentation indicating receipt by you of moneys?

A I believe at the time I met Mr. O'Sullivan, about the middle of June, I did sign a letter, I don't know if it was an escrow agreement or an agreement of some form, concerning this amount of money which was performed, to the best of my recollection.

MR. MEISELMAN: May I have this marked, sir.

THE CLERK: Yes, sir.

AX marked for identification, defendant McNamara's exhibit AX.

(So marked.)

BY MR. MEISELMAN:

Q I show you defendant's exhibit AX, Mr. Sfaelos, and I ask you whether your signature appears thereon?

A Yes, that is my signature.

Q Is that the document under which you had acknowledged the receipt of the moneys in escrow?

A If I can read it.

Is this really -- yes -- if you want -- yes, yes,

MR. MEISELMAN: I offer it in evidence, your Honor.

MR. RITCHIE: May I see it, your Honor.

THE COURT: Yes, certainly.

MR. RITCHIE: Your Honor, I would just ask the witness to read two words only for the sake of my understanding of the paper.

These two words (indicating to witness).

THE WITNESS: In escrow pending partial release.

MR. RITCHIE: "In escrow pending," now I understand.

THE COURT: "Partial release" are the two words.

THE WITNESS: "Releases."

MR. RITCHIE: My only objection is as to relevancy, it appears to me to be not relevant to the issues in this case.

THE COURT: The jury has heard about it, it may be received.

THE CLERK: It is now defendant's exhibit AX in evidence.

(So marked.)

(Continued next page.)

BY MR. MEISELMAN:

Q Mr. Sfaelos, there were discussions leading up to that exhibit?

A Yes, sir.

Q And those discussions were mainly concerning the question as to whether these moneys were to be paid to the contractors directly; is that correct?

A Whether these particular moneys were to be paid to the contractors?

Q Yes.

A Mr. McNamara was --

Q No, was that the discussion, basically?

A No, it was -- basically the discussion was --

Q Let me ask you this, then:

In the discussions which led up to the document, is it fair to state that Mr. McNamara or his attorney were concerned that the moneys payable on the requisitions may not go to the contractors?

A Correct.

THE COURT: Sub-contractors.

Q Or sub-contractors.

A Sub-contractors.

Q The sub-contractors, yes, sir.

And is it fair to state that Mr. McNamara and

his attorney wanted to make sure that the money they paid on the requisition would go to the sub-contractors?

A Absolutely.

Q And that is what led up to this escrow agreement?

A That is accurate.

Q All right.

Mr. Sfaelos, when if at all after June 28th, within the next month or two thereafter, did you see Harold Goberman, if you ever saw him at all in that period?

A I would say I saw him in relation to a family court matter.

Q When did you see him, sir?

A I honestly can't recall, it probably was in July, definitely in July.

Q Was it a matter of days, was it a matter of weeks?

A Oh, I would in all fairness say within that month following, within the month of July, I assume.

Q Can you place it any closer than that, sir? We are talking about July 28th.

THE COURT: No, June 28th.

Q June 28th, and July is only a few days away.

THE WITNESS: Your Honor --

A If I could place it for you, I would, but I can't recall.

I would say it was in July.

Q In June, June 28th, 1972, did you know where Mr. Goberman resided?

A No, I can't say I did.

Q As his lawyer, you did not know where he lived?

MR. RITCHIE: Objection, your Honor.

A I didn't know where he lived.

THE COURT: He has answered the question.

Next question.

A I didn't know.

Q Did you have a home telephone number?

A I had a number for Harold, if I recall.

Q Was that the Len-Al office?

A At that time, no, I had -- from February to June it was basically the on-job site which had a phone, on the job site, that I recall.

Q That is the only phone you had?

A Yes, where I could reach him.

Q Did you ever write to him in that interim?

A Excuse me.

Q Did you ever write to him in that interim?

A No, I don't, I don't believe I did.

Q If you had to write to him --

A If I had to write to him, I would have had his address.

Q What was his address?

A I never had it, I never wrote to him.

Q I see, I see.

Now, on June 28th you went to Len-Al's after being at the station house?

A Yes, to the house.

Q Now, did you go to Len-Al at Mr. Goberman's request or direction?

A Yes.

Q He didn't say to you that he wanted you to take him home?

A No, he told me to drop him off at Len-Al Contractors and he showed me the way.

Q As a matter of fact, Mr. Sfaelos, it was you who suggested that Mr. Goberman see a doctor?

A Yes, it was, it is my recollection.

Q As a matter of fact, sir, it was you who suggested that Mr. Goberman go to the firm of Kanter, Plotnick and Haber to sue Mr. McNamara?

A Completely incorrect.

MR. MEISELMAN: Thank you, sir.

MR. LEONE: No questions.

MR. FISCHETTI: No questions.

MR. RITCHIE: I have about two.

REDIRECT EXAMINATION

BY MR. RITCHIE:

Q You stated on the beginning of your cross-examination by Mr. Meiselman that you did not wish to get involved in any litigation arising from the events of June 28th?

A That is correct.

Q What was your reason for not wishing to get involved in such litigation?

MR. MEISELMAN: Objection.

THE COURT: Sustained.

Q Now during the course of your representation of Mr. Goberman in connection with the McNamara Buick job site and in the course of its construction, did Mr. Goberman ever indicate to you that his relationship with Mr. Thomas McNamara was changing from that, that it was no longer a father-son relationship?

MR. MEISELMAN: Objection, your Honor.

THE COURT: Overruled.

A Yes, he did.

Q And can you relate when that occurred and what was said to you and what events --

MR. GILLEN: Objection, your Honor, it is improper redirect.

THE COURT: Oh, it is not, it is directly and immediately related to what was brought out on cross-examination, there was examination as to the nature of the relations between Thomas McNamara and Harold Goberman.

A Apparently the father-son relationship ended, to the best of my knowledge, sometime I would say starting in May, around May 1st to 15th, when Harold complained to me as well as Mr. McNamara complained to me about each other, about the payments, Mr. McNamara was concerned about making sure that the payments were going to the proper parties, and Harold was concerned about obtaining payments and Harold Goberman was concerned about Mr. McNamara taking over the job, the air got a little heavy. Mr. McNamara was concerned about being ripped off and Harold was likewise concerned in a sense, and this is what he expressed to me, and the friendship that existed on the initial meeting, and let us say for a period of about a month, no longer existed.

MR. RITCHIE: I have no further questions, your Honor.

MR. GILLEN: No questions, your Honor.

MR. MEISELMAN: No questions, your Honor.

THE COURT: You are excused, Mr. Sfaelos.

THE WITNESS: Thank you.

(The witness was excused.)

MR. RITCHIE: The Government will call as its next witness Mr. Brady.

W A R R E N B. B R A D Y, called as a witness on behalf of the Government, having been duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. RITCHIE:

Q Mr. Brady, you were subpoenaed to produce certain records of the Brady Overhead Door Company; is that correct?

A I was notified by phone that I was subpoenaed, I was never in receipt of one.

Q You never received the subpoena?

A No.

Q What documents were you asked to produce?

A Records kept in the normal course of my business activities regarding the transactions between McNamara and Goberman.

Q Now, were you a sub-contractor on the McNamara Buick-Pontiac site in Port Jefferson Station?

A I initially started out as a sub-contractor, yes,

sir.

Q And what goods were you installing in those premises?

A Overhead garage doors and operators.

MR. MEISELMAN: And what?

THE COURT: The second word, overhead --

THE WITNESS: Operators, electrical operators.

THE COURT: The driver of the overhead door.

THE WITNESS: Yes.

BY MR. RITCHIE:

Q Now, how many overhead doors do you recall were installed or were there at least more than one?

A Yes, several doors.

Q And did you ever obtain these doors from one source or from more than one source?

A From more than one source.

Q And what were the sources that you obtained these doors from?

A Most of those doors were obtained from a company in New Jersey by the name of Armor-Like Door Manufacturing Company at 2700 Hamilton Boulevard, South Plainfield, New Jersey.

Q Were those doors kept in your general inventory or were they specially ordered for this job?

A They were ordered on the basis of the signed sales order for the job.

Q And did you produce certain records respecting your activities on that McNamara Buick job site?

A Did I produce?

Q Did you have those records?

A I have them with me, yes.

Q May I see them?

A Certainly.

MR. RITCHIE: Your Honor, I'm going to ask that these be marked in a packet, there are --

THE COURT: Do you want to show them to counsel?

(Continued next page.)

MR. GILLEN: Is that an offer?

MR. RITCHIE: I want to get it marked for Identification.

MR. MEISELMAN: Would you mark it separately, Mr. Ritchie?

MR. RITCHIE: Fine.

(Pause.)

MR. RITCHIE: May I have these marked for Identification, two packets?

THE CLERK: Yes, sir. First packet of documents marked Government's Exhibit 21 for Identification.

Second packet of documents marked Government's Exhibit 22 for Identification.

(So marked.)

Q Now, Mr. Brady, I show you a packet of several documents marked Government's Exhibit 21 for Identification and a separate packet marked Government's Exhibit 22 for Identification.

Now, with respect to the documents in Government's Exhibit 21 for Identification, can you identify what each of these documents is by page? This is the first page (indicating)?

A I have here a statement of July 31, 1972,

August 31, 1972. The July 31 reflects a statement of our invoice issued on 7/14/72 for $4,215. And it reflects a payment on July 24, '72, in the amount of $3800.

Q That is your invoice form?

A Yes. This is our statement form. I have a copy of the invoice attached if you want that.

Q Are those documents prepared by you in the regular course of your business?

A By my employees.

Q Are they kept in your files in the regular course of your business?

A Yes.

Q Those are with respect to the first two pages?

A Yes.

Q With respect to the third page, how is that document prepared?

A The third document is a letter from McNamara Buick with Mr. Thomas McNamara's signature, initialed by whoever handled the correspondence, saying he was enclosing the check for $3800 and that reflected a ten percent retainer from the full amount of 4215 which was normal in construction.

Q That is a letter from Thomas McNamara to yourself?

A To my company.

Q Now, with respect to page 4, what is that?

A Page 4 is our original invoice No. 52182 dated July 14, 1972. This invoice reflects the sizes and descriptions of all the doors and materials that we used on this job, subject matter north side of Nesconset, et cetera, a total of $4,215.

Q Is that document prepared by your company in the regular course of its business?

A Yes. It's a standard invoice form numbered and recorded.

Q Kept in your files in the regular course of your business?

A Yes.

Q What is the next item?

A The next document is a job worksheet which the mechanic worked from to do the job. That doesn't have any prices, only describes the material to be used and sizes and the operation required.

Q That is the document normally prepared in your business whenever there is a job?

A Yes.

Q And kept in your files?

A Yes. That has been duly noted by the employee

who worked on the job. Now, the rest of the documents cover the initial proposal to LenAl Construction back January 25, sales order of March 7th, and several change orders. There were several change orders on this job.

Q That is your company's proposal?

A Yes. I also have an acknowledgement from the manufacturer in New Jersey of the initial order for the doors before some of the changes took place.

Q That is prepared by the other company?

A Yes.

Q Whenever you order such doors from another company you get such an acknowledgement?

A Yes.

Q That acknowledgement is normally filed in your office?

A Yes.

Q In your files?

A Yes. Accompanied by our original purchase order 3881 of 3/15/1972.

THE COURT: That is your purchase order?

THE WITNESS: Our purchase order. Which is noted that items C, D, and E were for the Goberman-McNamara Buick job.

Q With respect to the clipped together documents

which will be put in the packet later, Government's Exhibit 22 for Identification, can you describe that page by page?

A Yes. The first page here is the invoice for another door that was ordered from the company in New Jersey for the McNamara job.

Q When was that ordered?

A It was entered on May 30, 1972. And it was received by us on June 15, that's when they invoiced it. We received it June 19th. The rest are copies of bills of lading when we picked up the material, et cetera.

The next one is a copy of the invoice for some wood doors that we used on the McNamara job from another manufacturer and another distributor. Then their packing slip came with the shipment. Then I have a note that I made on June 26, 1972.

Q Before you go into the note, are those documents prepared by your company, all of them?

A None of these documents are prepared by my company. All the manufacturer's documents is sent to us to confirm.

Q Whenever you do order doors, do you receive such invoices and acknowledgements?

A Yes.

Q Are they kept by you in the ordinary course of

your business?

A Yes.

Q With respect to that last document, you stated it was a note prepared by you, is that correct?

A Yes.

Q When was it prepared by you?

A Prepared on June 26, 1972, as a result of conversations with Mr. McNamara, Thomas McNamara.

Q On June 26, 1972, what if any conversation did you have with Mr. Thomas McNamara?

A Well, in brief, of course, this reflects that Mr. McNamara said to me: "The job is shut down because I am having a dispute with Mr. Goberstein. I would like to know what the work progress is to date on this job."

In other words, how much money do we owe you at this point. I told him work performed to date amounted to $4,000; that we had allowance for labor not performed to finish the job, two men, one and a half days, 215. Add that and the total of our contract, 4215. I gave this information to Mr. McNamara on the phone on that date.

Q Did you have any other conversation?

A On the date -- I think probably in the course of conversation with him, and I think it was probably at an earlier date he had mentioned to me Mr. Goberman was substi-

tuting smaller electrical wire than the contract called for. In other words, it was a higher gauge. The smaller the gauge number the thicker the wire. I heard that in the course of our contact. There were many changes made as you can see from the paperwork, size changes and --

Q From that paperwork, when were the doors received from the company in New Jersey installed on the job?

A We installed doors in May, June and completed the job on July 14th.

THE COURT: July what?

THE WITNESS: July 14, 1972. That is the date we invoiced it.

Q Do these records reflect any notation by any of your installers concerning work done on July 7th?

A Yes, original job worksheet, mechanics work -- there are several notations which I mentioned.

Q Can you show us?

A You took that folder away.

Q I'm sorry.

A We have the mechanics' remarks, time, what they did. You must understand mechanics do not take courses in writing and spelling particularly. They express themselves phonetically. You have to interpret it. Therefore it says: "Need order new spring or ten by eight eyelid, we used for

another job, Dave." It's dated 7/7/72. That was the last thing and we got to the job by the 14th and completed on that date.

Q The spring was to be used for that door, had not been installed?

A The job was not completed and was not invoiced

Q From whom did you receive the spring for that particular door?

A We would re-order it from the original manufacturer.

Q Was the original manufacturer the New Jersey company?

A Yes, for that one, yes.

Q It was only on July 14th you invoiced this job

A And completed --

THE COURT: July?

THE WITNESS: Fourteenth.

Q With respect to that June 26, 1972 note --

A Regarding our phone conversation?

Q Yes. Is that a note that you would normally make when, as a memorandum of a telephone conversation?

A Yes, I had a scratch pad on my desk and I alwa made notes for all of my conversations if it involves money or dimensions, and the mind is not so great that it doesn't

forget.

Q Is it your normal practice to file that with the job file?

A I tried to attach everything in one folder.

Q Have you kept that note in your job file concerning this particular job?

A Yes.

MR. RITCHIE: Your Honor, I will offer into evidence Government's Exhibit 21 and Government's Exhibit 22.

MR. MEISELMAN: May I examine?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. MEISELMAN:

Q Mr. Brady, a good many of these orders that are being offered now, the orders were given to you by Thomas McNamara, is that correct?

A I want to refresh my recollection here.

I made some notes. I would say up until the first part of May all my dealings were with Mr. Harold Goberman representing H. Goberman, HarMac Incorporated, who our original sale orders went out to.

Q Was it H. Goberman or HarMac?

A All my paperwork indicates H. Goberman and

nre 12/13/74

the initial contract I have is signed by H. Goberman.

Q Who paid you on this job, Mr. Brady?

A (No response.)

Q Withdrawn. You were paid on this job, weren't you?

A Yes, I was paid on this job.

Q Who paid you?

MR. RITCHIE: Objection.

THE COURT: Overruled.

Q Who paid you, sir?

A I received payment from either Mr. Thomas McNamara directly or McNamara Buick. However, I normally keep a record if I have any question of the integrity of the person I am dealing with. I usually keep a bank record for the bank member. On this occasion I didn't because I dealt with Mr. McNamara for about 20 years and had a wonderful business relationship with him. I didn't keep a record.

(Continued on next page.)

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VOIR DIRE EXAMINATION

BY MR. MEISELMAN: (Cont.)

Q We were talking about small things, a spring which you had your mechanic install in the early part of July, is that correct?

A Yes.

Q And the reason that spring was delayed is because the spring was used on another job?

A A mechanic inadvertently took it assuming it was available but it belonged to the McNamara job.

Q The original order was given I think by Len-Al Construction?

A No, my original proposal -- I assume back in January '72, because having done work for Len-Al that they were going to handle this job.

Q Did anybody at the time of the initial order disabuse you of that belief?

A We never got to the order stage, we were at the proposal stage. The next proposal I issued in March, March 7th, after some phone conversations with Harold Goberman generated in a sales order and he had confirmed it on the telephone and we confirmed it in the mail on March 7th.

THE COURT: With whom was that second March proposal made?

THE WITNESS: With H.Goberman and Harmac, care of McNamara Buick, Main Street, Port Jefferson.

Q Can you tell us which one if at all?

MR. RITCHIE: Which one what?

Q Was the order by H. Goberman or Harmac?

A You mean who signed my sales order?

Q Yes.

THE COURT: Who was the customer in your opinion?

A The customer was H. Goberman and Harmac, Inc..

Let me say this, an H. Goberman and Harmac was to the best of my knowledge was my customer. I believe I was dealing with these individuals. But anyway let me see, finally, when we got the thing resolved and got down to the final order, I had -- I'm sorry to keep you waiting, but on May 18th --

MR. RITCHIE: Your Honor, may we have that file also marked for identification?

THE COURT: Later. Let the man go on.

A (Continuing.) May 18th I prepared a change order showing all the changes on the job because there had been many. Then I had my office man hand-deliver several copies of this order to McNamara's office and Mr. McNamara requesting a signature okaying this order as it was finalized. All I received back was an order signed by H. Goberman. And

having dealt with Mr. Goberman up to this point, I accepted that as authority to go ahead.

MR. MEISELMAN: I object to the entry into evidence as not connected sufficiently to Harmac and not within the purview of the indictment.

THE COURT: Overruled.

MR. RITCHIE: Can we have these marked for identification?

THE WITNESS: That is a chronological note --

THE CLERK: First exhibit 21 and 22 marked in evidence.

Now, a folder containing documents marked for identification as Government's exhibit 23.

(All so marked.)

MR. RITCHIE: Why don't you mark a paper and attach it to this.

THE CLERK: Yes sir.

MR. RITCHIE: I have spoken with each of the defense counsel and they have no objection to the substitution of copies for the original. I will move if your Honor would allow that --

THE COURT: Yes.

(Continued next page.)

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DIRECT EXAMINATION

BY MR. RITCHIE: (Cont.)

Q Is it your testimony that Mr. Goberman was doing all the -- was having all the discussions with you, concerning the installation of these doors prior to May 1, 1972?

A Yes. I didn't pin it down to the exact date. I got the feeling Mr. McNamara might take it over. We were dealing with some other building not in the original contract, the used car building specifically.

Q It was after the beginning of May that Mr. McNamara began to be involved directly?

A Yes.

Q Now, with respect to Government's exhibit 21, just show me once again the work sheet?

A Job work sheet (indicating). The one the mechanics worked from.

Q Now, rather than read all of these documents, can you just state from whom or what were the companies in New Jersey from whom certain of the doors were ordered?

A Arm-R-Lite. Do you want me to spell that?

Q Is it A-r-m-o-r?

A A-r-m Hyphen R Hyphen L-i-t-e.

Q Located in what town?

A South Plainfield, New Jersey.

Q On what date were the doors ordered from the Arm-R-Lite Company fully installed?

A Well, the initial order originated on March15, 1972.

Q When was it finally installed?

A All the doors were installed July 14, 1972.

MR. RITCHIE: I have no further questions.

MR. MEISELMAN: No questions.

MR. LEONE: No questions.

MS. SELTZER: No questions.

THE COURT: You are excused, Mr. Brady.

MR. RITCHIE: We have one more short witness. I don't know if your Honor --

THE COURT: Get him over with.

MS. KATZ: The Government calls Jeremiah Murphy.

J E R E M I A H M U R P H Y , a witness called on behalf of the United States of America, was sworn by the Clerk of the Court, and testified as follows:

DIRECT EXAMINATION

BY MS. KATZ:

Q Mr. Murphy, can you tell us your occupation?

A I am employed by General Motors.

Q What are your duties?

A Car distributor for Buick Motor Division in the

New York Sales Office.

Q What geographical area does your office cover?

A All of Long Island, New York City, sections of Connecticut and upstate New York.

Q Are you familiar with the dealership of McNamara Buick-Pontiac?

A Yes, I am.

Q Can you tell us how Buick gets from the manufacturer to the dealers the --

MR. MEISELMAN: In connection with McNamara Buick-Pontiac, or generally, your Honor?

Q In general?

A Yes, I am.

Q Can you tell us how generally Buick cars would come from the manufacturer to a dealer in the New York area?

A They are shipped from four assembly plants, one in Leeds, Missouri, Wilmington, Delaware, Framingham, Massachusetts, and Flint, Michigan.

Q How are the cars shipped?

A From two of the assembly plants directly by truck, from the other two assembly plants by rail and then shipped by truck.

Q Shipping to a dealer from any of these plants, are there any stops made on the way?

A Well, if they are shipped by a truck, usually it's a case where they have 6 or 7 cars on a load and there are different dealers in different geographical areas and there would be other stops along the way at other Buick dealerships.

Q In another state?

A I would say just in the geographical area the dealer is in.

MS. KATZ: The Government asks this be marked for identification. Two envelopes containing 9 IBM cards.

THE CLERK: That envelope marked Government's exhibit 24 for identification.

(So marked.)

MS. KATZ: One envelope containing 11 IBM cards.

THE CLERK: That envelope marked Government's exhibit 25 for identification.

(So marked.)

BY MS. KATZ:

Q Now, I show you Government's exhibit 24 and 25 marked for identification and ask if you recognize the documents contained in the envelope?

A Yes, I do.

Q Can you tell the Court what they are?

A Shipping record cards.

Q Who are these IBM -- they are IBM cards?

A Yes.

Q Can you tell us how these documents are prepared?

A Well, at the time that the approximate time that the car is shipped to the dealer --

MR. MEISELMAN: In order to shorten this, I concede General Motors records are made in the regular course of business.

MS. KATZ: Can we have them marked in evidence?

MR. MEISELMAN: I don't know what they are.

THE COURT: These cover the shipments to McNamara Buick?

THE WITNESS: Yes, they do.

THE COURT: Does that help any?

MR. MEISELMAN: May we have a side-bar?

MR. LEONE: We might speed it up if we have a side-bar.

(The following took place at side-bar.)

THE COURT: I don't want thejury to think the whole crew is out of its mind. They know where the cards came from.

MR. MEISELMAN: I am not arguing that.

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MR. LEONE: Can I suggest something?

Can't we get them into evidence without giving up any rights to objection on the ground there is no jurisdiction here?

THE COURT: It doesn't depend on that, certainly--

MR. MEISELMAN: I also want to voice an objection that nowhere in the indictment is McNamara Buick mentioned. McNamara Re Nu-Cars --

MR. RITCHIE: But --

MR. MEISELMAN: May I finish?

MR. RITCHIE: I am sorry.

MR. MEISELMAN: McNamara Re Nu-Cars was not a franchise dealer and never was mentioned in the indictment and nowhere in the trial has it been established that McNamara Buick-Pontiac is the person to whom is effected by the --

MR. RITCHIE: I will bring in the witnesses, if necessary.

MR. MEISELMAN: Nowhere --

MR. RITCHIE: I don't think -- if it is objected to I will bring in the witnesses.

THE COURT: I think this is going to help us a lot. We are making a tremendous impression on the jury. They go away for generations and they will tell

their children until the fourth generation how efficiently Courts operate to demonstrate the obvious.

MR. MEISELMAN: I am willing to make my objection now to reserve any rights on the matter so we can go quickly.

THE COURT: The word automobile is not used in paragraph 1 of the indictment nor is the name. Everybody agrees on that. That doesn't prejudice anybody. Now his approving something that is way out in the wild blue yonder will not advance the indictment or --

MR. MEISELMAN: Is there a reservation of my right on --

THE COURT: Yes indeed.

(The following took place in open Court.)

MS. KATZ: The Government would like to offer these two envelopes into evidence.

THE COURT: It should be made clear, I take it, Mr. Murphy, no cars were ever shipped to a company called McNamara Re-Nu-Cars, Inc.. That is not the customer's name?

THE WITNESS: No sir. As far as I knew it is McNamara Buick-Pontiac.

THE COURT: That is thename of the customer and that is what those cars relate to?

THE WITNESS: That's right.

MR. MEISELMAN: These are computer cards. I can't read them and I take the witness' word for it.

THE COURT: Probably a couple of people on the jury can.

Are you going to have him interpret them?

MS. KATZ: Yes.

THE CLERK: Now Government's exhibits 24 and 25 in evidence.

(So marked in evidence.)

BY M S KATZ:

Q Now, Mr. Murphy, can you explain the code used on these documents?

A Yes,I can. They are IBM cards, keypunched and code printed on the cards that show the zone office and the dealer that the car is shipped to, it shows the order number, the model of the car, the equipment on the car and the vehicle identification number.

(Continued next page.)

Q Looking at those series of numbers that stand for the destination zone, can you tell us what destination zone those cards indicate?

A The New York zone.

Q And you did say that the next series of numbers stand for the dealership?

A Yes, that is correct.

Q Would you read those numbers and tell us what the dealership is that they stand for?

A It is 229, and that is the code number for the McNamara Buick in Port Jefferson.

Q Do you know the address in Port Jefferson?

A The street address?

Q Yes.

A No, I don't

Q Do you know what street it was on?

A It is on the corner of Route 112 and I think the Smithtown By-pass. I don't know the street number or the building.

And can you tell us what the next series --

MR. MEISELMAN: Is the witness testifying to that?

THE COURT: What is the date of the card, what period is covered by it?

THE WITNESS: Well, there are cards here from 1972 vehicles and 1973 vehicles, the 1973 vehicles, the date of shipment would be 9/13/73, and the 1972 vehicles, the date of shipment is 7/572.

MR. MEISELMAN: What is he referring to, is the address given by Mr. Murphy the address obtained from the record or is he testifying from his own knowledge?

THE WITNESS: I am testifying from my own knowledge.

BY MS. KATZ:

Q Can you tell us what the next series of numbers stand for?

A The next series of numbers stand for the order number of the wholesale car order.

Q And is there some numbers that stand for the vehicle identification number?

A Yes, there are.

Q And what is the first entry in that box, is that the numerical period..

A It is the numerical period.

Q And what does that stand for?

A That stands for the year, the year of the vehicle.

Q And the next entry is an alphabetical letter; si that correct?

A Yes, it is.

Q What does that indicate?

A That stands for the plant that the car is produced at.

Q Going through the series of cards, can you tell this Court the place of origin of the shipments?

A Yes, I can.

On the 1973 vehicles, they -- three of them were produced at Framingham.

One was produced at Wilmington, Delaware.

Six were produced at Flint.

On the 1972 vehicles, all nine were produced at Wilmington, Delaware.

Q And immediately below the vehicle identification number box, there appears a box; what would that box indicate?

A That is the date, the approximate date that the car was shipped, it is the date that the car was invoiced.

Q When you say "shipped," do you mean shipped from the plant?

A That it was turned over to the carrier, leaves

the assembly plant and goes into the hands of the carrier who transported the cars.

Q If you continue to the left there is a box marked "date, DELA'D" and what would that box indicate?

A To the left or the right side?

Q I guess it is to the right, it is the last series of numbers.

A Date sold, that is the approximate date that the car was delivered to the new car purchaser.

Q Can you read from the card the date the car was shipped and the corresponding date it was delivered, for each of the cars?

A One was shipped on 9/13/73 and the delivered on 9/27.

Another one was shipped on 10/21 and delivered on 10/25.

Shipped December 9, and delivered on December 19.

Shipped January 19 and delivered January 13.

THE COURT: Is this in '74, then?

THE WITNESS: This is '73.

THE COURT: So that -- well, that is September, October, December and January of what year?

THE WITNESS: This is January of 1973 and the October dates would be 1972.

THE COURT: And the September date?

THE WITNESS: The September date would be 1972.

THE COURT: And the December date?

THE WITNESS: 1972.

A The next car was shipped 8/22 and delivered 10/3.

THE COURT: Of what year?

THE WITNESS: That would be 1972.

A The next car was shipped, shipped 6/8 and delivered 7/2, and I would say that would be 1973.

The next car was shipped November 13, and delivered November 29, 1972, that would be.

One was shipped February 5 and delivered 3/19 of '73.

Shipped 3/22 and delivered 4/23 1972.

Shipped 4/5 and delivered 11/20 of 1973.

The last 1973 car was shipped on 5/5 and delivered on 5/30 of 1973.

And 1972 vehicles --

THE COURT: When you say '73, you mean the '73 model?

THE WITNESS: The '73 model, yes, that is

correct.

A And on the '72 vehicles, the first one was shipped on 7/5 and delivered to the customer on 9/6 of '71.

And the next one was shipped on 6/2 and delivered on 6/19 of '72.

THE COURT: '72?

THE WITNESS: '72.

THE COURT: Now the July one was what?

THE WITNESS: The July one was '72.

A The next car was shipped on 5/9 and delivered 5/24 of '72.

The next car was shipped on 4/6, delivered 4/19/72.

Shipped 3/6, delivered 3/16/72.

Shippped 22/2, delivered 3/10 of '72.

Shipped 1/19, delivered on 2/2 of '72.

Shipped 9/22, delivered on 9/30 of '71

MS. KATZ: Your Honor, we will forego the rest of the readings.

MR. MEISELMAN: No objection.

MR. GILLEN: No objection.

THE COURT: What was that?

MR. LEONE: No objection.

MS. KATZ: He made the point, we have made the

point, he doesn't have to continue with any more cars.

(Cont'd on next page.)

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DIRECT EXAMINATION

BY MS. KATZ: (Cont.)

Q I just have one or two more questions:

In the years 1972 and 1973, approximately how many cars were shipped to the McNamara Car dealership in each month?

MR. MEISELMAN: I object I believe to the form and content, your Honor.

THE COURT: Yes, I think in view of what we have discussed at side-bar I think you must ask as to what company --

Q In 1972 and 1973 --

THE COURT: And you are asking for shipments within the calendar year.

MS. KATZ: Within the calendar year.

BY MS. KATZ:

Q Each month approximately how many cars would be shipped to your dealership -- I'm sorry, I don't remember the number on the IBM card.

A 220.

MR. MEISELMAN: I will object to that, your Honor.

THE COURT: I think that he told us that the company was the McNamara Buick.

THE WITNESS: McNamara Buick-Pontiac.

THE COURT: What?

THE WITNESS: McNamara Buick-Pontiac.

MR. MEISELMAN: Limited strictly to that I have no objection except as to what I previously stated at the side-bar, your Honor.

THE COURT: As long as that is true.

BY MS. KATZ:

Q Do you know for a fact that all of these cars were shipped only to a company named the McNamara Buick-Pontiac, and does it indicate on the card that this was the name of the dealership?

A Well, it indicates the code name of the dealership and that is the name that we have on record with that code number.

THE COURT: And the contract between the manufacturer and the dealership ordinarily would contain its name; isn't that not so?

THE WITNESS: Yes.

THE COURT: That would have the correct name of the company on it, it would be the one corresponding to the code.

THE WITNESS: That is correct, sir.

THE COURT: All right.

BY MS. KATZ:

Q Can you tell us approximately how many per month are shipped?

A I would say approximately 30 to 40 Buicks.

THE COURT: A month?

THE WITNESS: A month.

Q Was that so in 1972 and 1973, the number you are giving us, is it the approximate monthly number of cars?

A I think it would be a little higher in '73 than it was in '72.

Q Just one more question.

This is only a representative sample of the IBM cards you have with this customer; is that correct?

A That is correct.

THE COURT: We aren't going to do all of those 30 months.

MS. KATZ: Right.

I have no further questions.

MR. MEISELMAN: Mr. Murphy, it is late, I will' try to limit myself.

CROSS-EXAMINATION

BY MR. MEISELMAN:

Q Do you have any records, do you have any knowledge concerning a company called McNamara Re: Nu-Cars, Inc.?

A No, sir.

Q To your knowledge or to your records have they ever been a dealer of Buick's or any other cars?

A Not that I know of.

Q Have they ever purchased, McNamara Re: Nu-Cars, Inc., have they ever purchased any car of any kind or description from General Motors?

MR. RITCHIE: Your Honor, I have to object, it is beyond the scope of this witness' knowledge.

THE COURT: I don't think you ought to beat the horse to death, he is dead now.

BY MR. MEISELMAN:

Q You gave an address on Nesconset Highway and Route 112, you said with reference to a car shipped on July 5, '72, that the car was shipped to Nesconset Highway and Route 112.

Now if I were to tell you that that location was not opened until September of '72, would that in any way make you change your mind as to whether these vehicles were so shipped?

A Yes, sir, it would.

Q All right, sir.

Now all the vehicles that you referred to don't give an address of shipment, do they?

A That is correct.

THE COURT: The cards don't show it.

THE WITNESS: The cards don't show.

BY MR. MEISELMAN:

Q As far as you know, no vehicles were ever shipped to McNamara Re: Nu-Cars, Inc. at Nesconset Highway?

A I don't understand that question.

Q No cars were ever shipped to Re: Nu-Cars, Inc. on Nesconset Highway?

A That is correct.

Q And no vehicles were ever shipped to McNamara Buick on Nesconset Highway until the latter part of 1972?

THE COURT: Well, he must accept your statement.

Q If you know?

A If the statement you made about the date of that building was built is correct, then you are correct.

Q Well, it depends solely on whether I'm telling you the truth, yes.

MR. RITCHIE: The Government will stipulate to that, your Honor.

THE COURT: Well, perhaps counsel can agree on that.

MR. MEISELMAN: Yes, that is correct.

THE COURT: It is agreed that the shipments in

face of the dealership being removed from downtown Port Jefferson to Nesconset Highway didn't take place until September 1972.

MR. RITCHIE: '72, so stipulated.

MR. MEISELMAN: It will be agreed, your Honor, that McNamara Buick-Pontiac did not move its location from Port Jefferson Village to Port Jefferson Station on Nesconset Highway until the latter part of September, 1972.

MR. RITCHIE: So stipulated.

MR. MEISELMAN: Will you also stipulate, Mr. Ritchie, that McNamara --

THE COURT: McNamara Re: Nu-Cars, Inc. --

MR. MEISELMAN: McNamara Re: Nu-Cars, Inc. was never a franchise dealer, and never purchased and never sold a vehicle of General Motors or anybody else.

MR. RITCHIE: I would doubt it, your Honor.

THE COURT: What is that.

MR. RITCHIE: I would so stipulate to that, your Honor, it is highly doubtful.

MR. MEISELMAN: What does that mean.

THE COURT: You mean it is doubtful, it is correct.

MR. RITCHIE: As far as I know that is a land

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holding company and not a dealership in cars, and I will stipulate --

THE COURT: I see what you mean, you doubt that they ever bought or sold an automobile.

MR. RITCHIE: I understand that --_well, no, I do mean that, yes.

THE COURT: Maybe a truck during construction.

MR. RITCHIE: An automobile, yes.

THE COURT: But that they never dealt in cars,

MR. RITCHIE: That is correct.

I will stipulate to that, your Honor.

MR. MEISELMAN: No further questions.

MR. LEONE: No questions,your Honor.

MS. KATZ: No further questions, your Honor.

THE COURT: You are excused.

(The witness was excused.)

MR. RITCHIE: I don't know what your Honor wants to do.

THE COURT: If we will stay one minute longer heads will roll.

MR. MEISELMAN: Your Honor, may I -- are you excusing the Court, your Honor.

THE COURT: Yes, excusing the jury.

MR. MEISELMAN: All right.

THE COURT: We will adjourn now until -- oh, we have that sentence -- 10:15, until 10:15 tomorrow, when we will have one other matter which will take a few minutes and we will then resume the trial.

Please don't discuss the case with one another or with anyone not on the jury until it is given to you to decide.

All right.

(At 5:10 o'clock p.m. a recess was taken.)

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